(16)

No. 94-1966-CMY
Status: GRANTED
CAPITAL CASE

Title: Dwight J. Loving, Petitioner
v.
United States

Docketed:
June 2, 1995

Court: United States Court of Appeals for the Armed Forces

Counsel for petitioner: Blume,John H.

Counsel for respondent: Solicitor General

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Apr 21 1995 | G | Application (A94-791) to extend the time to file a petition for a writ of certiorari from May 3, 1995 to July 2, 1995, submitted to The Chief Justice. |
| 2 | Apr 21 1995 | | Application (A94-791) granted by the Chief Justice extending the time to file until June 2, 1995. |
| 3 | Jun 2 1995 | G | Petition for writ of certiorari filed. |
| 5 | Jun 27 1995 | | Order extending time to file response to petition until August 2, 1995. |
| 6 | Jun 30 1995 | | Brief amicus curiae of United States Air Force Legal Services Agency, etc. filed. |
| 7 | Jul 11 1995 | | Brief amicus curiae of United States Navy-Marine Corps Appellate Defense Division filed. |
| 8 | Jul 13 1995 | | Brief amicus curiae of Public Citizen Litigation Group filed. |
| 9 | Aug 1 1995 | | Order further extending time to file response to petition until September 1, 1995. |
| 10 | Sep 1 1995 | | Brief of respondent United States in opposition filed. |
| 11 | Sep 6 1995 | | DISTRIBUTED. September 26, 1995 (Page 126) |
| 12 | Sep 19 1995 | X | Reply brief of petitioner filed. |
| 13 | Sep 27 1995 | | Petition GRANTED. limited to Questions 1, 2 and 3 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply. ********** |
| 14 | Nov 1 1995 | | SET FOR ARGUMENT TUESDAY, JANUARY 9, 1996. (2ND CASE). |
| 15 | Nov 9 1995 | | Joint appendix filed. |
| 16 | Nov 9 1995 | | Brief of petitioner Dwight Loving filed. |
| 17 | Nov 9 1995 | | Brief amicus curiae of United States Navy-Marine Corps Appellate Defense Division filed. |
| 18 | Nov 9 1995 | | Brief amicus curiae of American Civil Liberties Union filed. |
| 19 | Nov 9 1995 | | Brief amicus curiae of Public Citizen Litigation Group filed. |
| 20 | Nov 9 1995 | | Brief amicus curiae of Marci Hamiliton and David Schoebrod filed. |

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No. 94-1966-CMY

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 21 | Nov 9 1995 | | LODGING consisting of ten copies each of a publication, Power Without Responsibility and NYU Law Review. |
| 22 | Nov 9 1995 | | CIRCULATED. |
| 25 | Dec 1 1995 | | Record filed. |
| | | * | Original record proceedings U.S. Court of Appeals for the Armed Forces (formerly Military Appeals) (2 BOXES) |
| 23 | Dec 7 1995 | X | Brief amicus curiae of Criminal Justice Legal Foundation filed. |
| 24 | Dec 8 1995 | X | Brief of respondent United States filed. |
| 26 | Dec 26 1995 | | LODGING consisting of three copies of Manual for Courts-Martial United States (1955 Edition) submitted by the Solicitor General. |
| 27 | Dec 28 1995 | X | Reply brief of petitioner Dwight Loving filed. |
| 28 | Jan 9 1996 | | ARGUED. |

EDITOR'S NOTE

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Supreme Court, U.S.
FILED

No. 94-941966

JUN 2 - 1995

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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DWIGHT J. LOVING, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

---

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

---

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4228

## QUESTIONS PRESENTED

This is the first capital conviction and death sentence affirmed by the military courts to come before this Court in the modern era of capital punishment. Due to its unique procedural status, this case raises several important constitutional questions regarding the manner in which the military capital punishment scheme was both constructed and currently operates. These questions are:

I. Is Congress' legislative responsibility to establish the aggravating circumstances to be used in military capital cases one which can be delegated to the President consistent with the separation of governmental powers required by Article I, §§ 1 and 8 and the Eighth Amendment of the United States Constitution?

II. Whether Congress has implicitly delegated to the President its legislative authority to establish aggravating circumstances to be used in military capital cases?

III. If there has been such an implicit delegation of authority to the President, has Congress established constitutionally adequate standards to guide the President's exercise of legislative authority?

IV. Do the Fifth and Eighth Amendments permit a capital defendant to be convicted of murder and sentenced to death by an eight person jury?

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

---

No. 94-

DWIGHT J. LOVING, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

---

*PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

---

Petititioner, Dwight J. Loving, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

## CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported as *United States v. Loving*, 41 M.J. 213 (1994), and is attached to this petition as Appendix A. The order denying rehearing is attached to this petition as Appendix B. *United States v. Loving*, No. 68033/AR (February 2, 1995) (pending publication).

## JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on November 10, 1994. Rehearing was denied by the United States Court of Appeals for the Armed Forces on February 2, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(1), the United States Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals) having reviewed this case pursuant to Uniform Code of Military Justice [hereinafter U.C.M.J.] article 67(a)(1), 10 U.S.C § 867(a)(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. U.S. Const. art. I, § 1, which provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

2. U.S. Const. art. I, § 8, which provides in pertinent part:

> The Congress of the United States shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.

3. The Fifth Amendment to the United States Constitution, which provides, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

4. The Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

5. U.C.M.J. article 16(1)(A), 10 U.S.C. § 816(1)(A), which provides that a general court-martial may consist of "a military judge and not less than five members."

6. U.C.M.J. article 18, 10 U.S.C. § 818, which provides in pertinent part:



> [G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter. . . .

7. U.C.M.J. article 36(a), 10 U.S.C. § 836(a), which provides in pertinent part:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

8. U.C.M.J. article 56, 10 U.S.C. § 856, which provides that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."

9. U.C.M.J. article 118, 10 U.S.C. § 918, which provides in pertinent part:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
>
> (1) has a premeditated design to kill;
>
> . . . . ; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty

under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

10. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 1004(c), which, at the time of petitioner's trial, provided in pertinent part:

> *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:
>
> . . . .
>
> (7) That, only in the case of a violation of Article 118(1):
>
> . . . .
>
> (B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;[1]
>
> . . . .
>
> (J) The accused has been found guilty in the same case of another violation of Article 118;
>
> (8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing.[2]

## STATEMENT OF THE CASE

Dwight Loving enlisted in the United States Army in 1986 and was serving as a Private (E1) at Fort Hood, Texas, at the time of

[1] R.C.M. 1004(c)(7)(B) was amended in 1994.

[2] R.C.M. 1004(c)(8) was amended in 1991.



his offenses and trial. On January 31, February 9 and 21, March 6, 17, 23, 27-31, and April 1 and 3, 1989, Private Loving was tried at Fort Hood before a general court-martial composed of eight officer members.[3] He was found guilty of attempted murder, premeditated murder, felony murder, and four specifications of robbery, in violation of U.C.M.J. articles 80, 118(1) and (4), and 122, 10 U.S.C. §§ 880, 918(1) and (4), and 922, respectively. The court-martial panel announced three aggravating factors, pursuant to R.C.M. 1004(c)(7)(B) and (J) and R.C.M. 1004(c)(8), and sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances.

Petitioner's convictions and sentence were subsequently affirmed by the United States Army Court of Criminal Appeals (formerly the United States Army Court of Military Review). *United States v. Loving*, 34 M.J. 956 (A.C.M.R. 1992).[4] The Army court denied a petition for reconsideration on April 15, 1992. *United States v. Loving*, 34 M.J. 1065 (A.C.M.R. 1992).[5] The United States Court of Appeals for the Armed Forces affirmed the Army court's decision on November 10, 1994. *United States v. Loving*, 41 M.J. 213 (1994). The Court of Appeals denied a petition for reconsideration on February 2, 1995. *United States v. Loving*, No. 68033/AR (February 2, 1995) (pending publication).

## HOW THE QUESTIONS PRESENTED WERE RAISED AND DECIDED BELOW

Following the decision of the United States Court of Appeals for the Armed Forces in *United States v. Matthews*, 16 M.J. 354

[3] Twelve members were detailed by the convening authority, but four were excused through challenges for cause and peremptory challenges.

[4] A copy of the Army court's decision is attached as Appendix C.

[5] A copy of the Army court's opinion denying reconsideration is attached as Appendix D.

(C.M.A. 1983),[6] the President amended the Manual for Courts-Martial, United States, 1969 (Rev. Ed.), to include capital sentencing procedures and establish specific aggravating factors. Executive Order 12460, 49 Fed. Reg. 3169 (1984). The President subsequently promulgated the Manual for Courts-Martial, United States, 1984, which became effective on August 1, 1984, and included the aggravating factors to be applied in capital cases in R.C.M. 1004(c).[7]

The constitutionality of R.C.M. 1004(c) was first reviewed by the United States Navy-Marine Corps Court of Criminal Appeals (formerly the United States Navy-Marine Corps Court of Military Review), in *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989).[8] This judgment was later reviewed in a bifurcated appeal by the United States Court of Appeals for the Armed Forces.[9] *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991).[10] The Armed Forces Court of Appeals ruled in *Curtis* that Congress may delegate its authority to the President to establish capital sentencing procedures and aggravating factors.

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[6] In *Matthews*, the court recognized the infirmity in military capital sentencing procedures in light of this Court's opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny. Specifically, the court held that then existing standards were defective because there was no requirement "that the court members make specific findings as to individualized aggravating circumstances." *Matthews*, 16 M.J. at 380. The court declared, however, that the defects could be corrected either by Congress in the exercise of its Article I power, or by the President "in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers expressly delegated to him by Congress." *Matthews*, 16 M.J. at 380.

[7] R.C.M. 1004 was subsequently amended in February 1986, July 1991 and November 1994.

[8] The Navy court's opinion is attached as Appendix E.

[9] The court bifurcated the proceedings to determine the constitutionality of R.C.M. 1004 and the military capital punishment process prior to addressing the merits of the case. *Curtis*, 32 M.J. at 255.

[10] The court's opinion is attached as Appendix F.



*Id.* at 260. Moreover, the court held that "Congress has—at least, implicitly—delegated" to the President the power to establish capital sentencing procedures and aggravating factors. *Id.* at 263 n.9.[11] The court, finally, found that the President's delegated authority had been sufficiently guided by the language of U.C.M.J. article 36(a). *Id.* at 263.[12]

Likewise, the Armed Forces Court of Appeals held in *Curtis* that there was no constitutional infirmity in allowing a sentence of death to be imposed by a court-martial composed of less than twelve members. First, the court declared that "courts-martial are not subject to the jury-trial requirements of the Sixth Amendment." 32 M.J. at 267. Next, the court dispensed with the Eighth Amendment by declaring simply that "state courts are not required constitutionally to have 12 members." *Id.*

Prior to trial, petitioner challenged the President's authority to establish R.C.M. 1004. Tr. Rec. at 200-06, Appellate Exhibit XLII. The military judge denied the motion. Tr. Rec. at 289. On appeal to the Army court, petitioner continued the challenge to the constitutionality of R.C.M. 1004 and also challenged the constitutionality of a court-martial panel composed of only eight members. The Army court did not discuss these issues at all. *United States v. Loving*, 34 M.J. 956 (A.C.M.R.), *recon. de-*

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[11] Because the court found an implicit delegation of authority to the President, it declined to "consider what inherent authority the President would have in this area." Thus, the question of inherent authority is not before this Court. *Id.*

[12] Despite the fact that the lower court ruled against Curtis on the constitutionality of the aggravating factors in R.C.M. 1004 issue and the twelve-member panel issue, the lower court remanded Curtis' case to the Navy-Marine court on another issue. *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 502 U.S. 1097 (1992). Thus, in response to Curtis' petition for a writ of certiorari on the questions presented in this petition, the sole government response was that the issue was not ripe for review because of the remand. This Court declined to grant a writ of certiorari in *Curtis* although Justices White and Blackmun dissented from denial of certiorari. *Curtis v. United States*, 502 U.S. 952 (1991).

*nied*, 34 M.J. 1065 (A.C.M.R. 1992).[13] The Armed Forces Court of Appeals also declined to discuss these issues citing its opinions in *Matthews* and *Curtis*. *United States v. Loving*, 41 M.J. 213, 287, 293 (1994).

## REASONS THE WRIT SHOULD BE GRANTED

The substantial and important federal constitutional and statutory issues presented in petitioner's case are controlled by two normally separate and distinct bodies of constitutional law; the separation of powers doctrine and the heightened need for reliability demanded in capital cases pursuant to this Court's Eighth Amendment jurisprudence. Because this is the first death sentence affirmed by the military courts to come before this Court in the modern era of capital punishment, the intertwined separation of powers and Eighth Amendment issues make this a case of first impression warranting the invocation of this Court's certiorari jurisdiction.

### I. PURSUANT TO THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE DOCTRINE OF SEPARATION OF POWERS, THE ESTABLISHMENT OF AGGRAVATING FACTORS TO BE USED IN CAPITAL CASES IN THE ARMED FORCES TO NARROW THE CATEGORY OF PERSONS ELIGIBLE FOR THE DEATH PENALTY IS A LEGISLATIVE DECISION VESTED EXCLUSIVELY IN CONGRESS AND CANNOT BE DELEGATED TO THE PRESIDENT.

#### *A. The establishment of aggravating factors to be used in military capital cases is a legislative decision vested exclusively in Congress and may not be delegated.*

In *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), a five-justice majority of this Court declared that the death penalty, as then applied, violated the Eighth and Fourteenth Amend-

[13] The court simply declared, "Several of the issues raised have been resolved by the Court of Military Appeals and will not be discussed in this opinion." 34 M.J. at 958 (citing *Curtis*).



ments. A common theme ran through all five concurring opinions: without reliable guidelines established by the state legislatures and Congress to be followed by judges and juries, the death penalty was being imposed in an unconstitutionally arbitary and capricious manner. The practical affect of this Court's decision was to invalidate all existing capital punishment provisions, including the death sentence provision of U.C.M.J. article 118.

As will be set forth below, post-*Furman* Eighth Amendment jurisprudence has established even more clearly that capital punishment schemes—including the determination of the classes of offenders eligible for the death penalty—must be established by a legislature. These determinations are substantive policy decisions and, therefore, a legislative function in the same manner that defining criminal offenses is a legislative function.[14] *See Whalen v. United States*, 445 U.S. 684, 689 (1980) ("the *legislative power*, including the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly in *Congress*") (emphasis added).

This Court recognized long ago, in *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (citing *Weems v. United States*, 217 U.S. 349 (1910)), that the words of the Eighth Amendment "are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In giving life to this standard, the Court has consistently and repeatedly emphasized the need for legislative action whenever a jurisdiction wished to restore the death penalty. In *Gregg v. Georgia*, 428 U.S. 153

[14] This injunction—with the sole exception of the Armed Forces—has been honored. Petitioner's counsel are not aware of *any other* jurisdiction with capital punishment as a sentencing option, including the federal system, where the determination of aggravating factors in a capital case was made outside the halls of the legislature. More specifically, in no state that allows the death penalty has the Governor established the aggravating factors.

(1976), this Court emphasized, even as it held that capital punishment was not a *per se* violation of the Eighth Amendment, that:

> the constitutional test is intertwined with an assessment of contemporary standards and the *legislative* judgment weighs heavily in ascertaining such standards. "[I]n a democratic society *legislatures, not courts,* are constituted to respond to the will and consequently the moral values of the people."

428 U.S. at 175-76 (Opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added) (internal citation omitted). Construing the meaning of *Gregg,* the Court declared in *Zant v. Stephens,* 462 U.S. 862 (1983):

> In *Gregg,* the joint opinion again recognized the need for *legislative* criteria to limit the death penalty to certain crimes: "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

*Id.* at 877 n.15 (quoting *Gregg,* 428 U.S. at 184) (emphasis added). Likewise, in *McCleskey v. Kemp,* 481 U.S. 279 (1987), this Court again declared that, "[i]t is the *legislatures, the elected representatives of the people,* that are 'constituted to respond to the will and consequently the moral values of the people.' " *Id.* at 319 (quoting *Furman,* 408 U.S. at 383 (Burger, C.J., dissenting)) (emphasis added).[15]

In light of this Eighth Amendment jurisprudence and the doctrine of separation of powers which demands that Congress be

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[15] *See also Harris v. Alabama,* __U.S. __, 115 S.Ct. 1031, 1035 (1995); *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989); *Stanford v. Kentucky,* 492 U.S. 361, 370 (1989); *Thompson v. Oklahoma,* 487 U.S. 815, 821 (1988).



the designated voice to express the conscience of the community, it is apparent that the determination of when and under what circumstances the death penalty is appropriate is a substantive *legislative* determination.[16] Thus, the determination of aggravating factors to "genuinely narrow the class of persons eligible for the death penalty," *Zant v. Stephens,* 462 U.S. at 877, in the Armed Forces is uniquely the function of Congress. *See Gregg,* 428 U.S. at 176 (quoting *Gore v. United States,* 357 U.S. 386, 393 (1958)) (the specification of punishments is "peculiarly [a] question[ ] of legislative policy") Therefore, it is a responsibility Congress must discharge and it may not delegate its authority in this arena to anyone under any circumstances. *See J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 406 (1928) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President").

### *B. If Congress may delegate its legislative authority to establish aggravating factors in military capital cases, it may not make that delegation to the President.*

The common starting point under the separation of powers doctrine is that the Congress shall write the laws, the Executive shall implement the laws, and the Judiciary shall interpret the laws. Congress simply cannot delegate to the President the power to make laws. As this Court declared in *Field v. Clark,* 143 U.S. 649 (1892):

> The true distinction . . . is between the delegation of power to make the law, which necessarily involves a

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[16] The Armed Forces Court of Appeals in *Curtis* simply dismissed this question by declaring that aggravating factors are not elements of the offense. *Curtis,* 32 M.J. at 260. While this legal proposition is not disputed here, there can be no doubt that aggravating factors are *substantive elements* in the determination of whether death is an appropriate punishment. *Sawyer v. Whitley,* __ U.S. __, 112 S.Ct. 2514, 2522 (1992) (both the elements of the crime and the statutory aggravating circumstances are used to narrow the class of defendants eligible for the death penalty).

> discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

*Id.* at 693-94 (quoting *Cincinnati, W. & Z.R. Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77, 88-89 (1852)); *see also Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting). "[T]he intent of the Framers [was] that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, 424 U.S. 1, 120 (1976).

Although *Mistretta* does not control the outcome of this case,[17] the Court specifically recognized therein the dangers involved when Congress tries to confer upon the Executive the power to promulgate sentencing guidelines. Such an attempt "unconstitutionally . . . unite[s] the power to prosecute and the power to sentence within one Branch." 488 U.S. at 391 n.17.[18] The constitutional problem this Court anticipated in *Mistretta* is realized in petitioner's case.

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[17] In *Mistretta*, this Court determined that delegation of authority to promulgate *non-capital* sentencing guidelines to an independent Sentencing Commission within the *judicial* branch did not violate the non-delegation principle. *Mistretta* provides no authority to delegate Congressional power to the President in order to establish aggravating factors in capital cases, however, because this Court assumed "without deciding" that Congress could and had granted the Sentencing Commission authority in the capital case arena. 488 U.S. at 378 n.11.

[18] In fact, when Congress decided to place the Sentencing Commission in the Judicial Branch rather than the Executive Branch, this very concern was expressed:

> Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

H.R. Rep. No. 1017, 98th Cong. 2d Sess. 95 (1984).



Pursuant to his authority under Article II, § 2 of the United States Constitution, the President is Commander-in-Chief of the Armed Forces. As such he is ultimately responsible for the prosecution of all offenses committed by members of the Armed Forces. In addition, the President as Commander-in-Chief, supervises the convening authoritys, who in turn convene the court-martial tribunal and select the members to determine both guilt or innocence and sentence, if necessary. *See* Hearings on S. 857 and H.R. 4080, 81st Cong., 1st Sess. (1949), *reprinted in* Index and Legislative History of the Uniform Code of Military Justice, at 113-18 (statement by Committee on the Judiciary, United States Senate, on a Uniform Code of Military Justice).[19] Likewise, military judges at the trial and appellate levels are appointed as judges by The Judge Advocates General of the respective services, who are responsible to the President. *Weiss v. United States*, __ U.S. __, 114 S.Ct. 752 (1994); *see also Ryder v. United States*, 39 M.J. 454, 455 n.* (1994), *cert. granted*, __ U.S. __, 115 S.Ct. 713 (1995) (argued April 18, 1995). Furthermore, in addition to having the inherent constitutional power to pardon or commute criminal sentences, *Schick v. Reed*, 419 U.S. 256, 266 (1974), the President is specifically assigned, under U.C.M.J. article 71(a), 10 U.S.C. § 871(a), the task of reviewing and approving all sentences of death once direct review by the military courts is completed and the sentence is affirmed or certiorari is denied by this Court. In sum, permitting Congress to delegate its legislative authority to the

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[19] During these hearings, it was observed:

> Not belonging to the judicial branch of the Government, it follows the courts martial must pertain to the executive department; and they are in fact simply instrumentalities of the Executive power, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein.

*Id.* at 115.

President places within the Executive the power to determine the class of military offenders eligible for the death sentence; the power to determine that petitioner should receive the death penalty; the power to convene the court-martial and select its members and the judge; and the final power to grant or withhold clemency once petitioner's direct appeal is completed.[20] This "blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid v. Covert*, 354 U.S. 1, 39 (1957).

## II. CONGRESS HAS NOT EXPLICITLY OR IMPLICITLY DELEGATED TO THE PRESIDENT THE AUTHORITY TO ESTABLISH AGGRAVATING FACTORS TO DETERMINE THE CLASS OF MILITARY OFFENDERS ELIGIBLE FOR THE DEATH PENALTY.

### *A. In light of this Court's mandate that Congressional delegations of authority to limit individual rights must be construed narrowly, the provisions of the U.C.M.J. do not support a conclusion that Congress intended at the time the U.C.M.J. was enacted, to delegate authority to the President to establish aggravating factors.*

This Court held in *Greene v. McElroy*, 360 U.S. 474, 506 (1959), that "acquiescence or implied ratification" is not "enough

[20] No other jurisdiction has allowed the executive to establish aggravating factors in capital cases. Several courts have held, however, that the *judiciary* may not establish aggravating factors in capital cases. *See, e.g., United States v. Woolard*, 981 F.2d 756, 759 (5th Cir.), *reh'g denied*, 990 F.2d 819 (5th Cir. 1993); *United States v. Harper*, 729 F.2d 1216, 1225 (9th Cir. 1984). Moreover, the blending of prosecutorial and legislative functioning present in the military far exceeds the constitutional delegation to the Attorney General in *Touby v. United States*, 500 U.S. 160 (1991). In *Touby*, Congress delegated to the Attorney General the authority to temporarily schedule controlled substances. In this case, however, the lower court found a permenent delegation to the President to do far more than simply schedule controlled substances and then prosecute those cases.



to show delegation of authority to take actions within the area of questionable constitutionality." *See also Mistretta*, 488 U.S. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."). *Furman* and its progeny leave no doubt that the death sentence provision of Article 118 is in an "area[ ] of doubtful constitutionality." *Greene*, 360 U.S. at 507. Thus, no implicit delegation of authority or ratification by acquiescence may be found for the aggravating factors in R.C.M. 1004(c). Only "explicit action by lawmakers," *Greene*, 360 U.S. at 507, would suffice to render R.C.M. 1004(c) a constitutionally proper exercise of Executive authority. There was no such legislative action.

The lower court's finding of an *implicit* delegation of authority to the President is based, in part, on the language of U.C.M.J. articles 18, 36, and 56, which were set forth previously. In construing these statutes so broadly, the lower court violated three venerable maxims of statutory construction. First, statutes in criminal prosecutions are to be strictly construed against the government and in favor of the individual. *Deal v. United States*, __ U.S. __, 113 S.Ct. 1993, 1998 (1993) (Stevens, Blackmun, and O'Connor, JJ., dissenting) ("Criminal statutes must be strictly construed"); *United States v. Mersky*, 361 U.S. 431, 440 (1960) ("In the context of criminal prosecution, we must apply the rule of strict construction.") Second, in capital cases, there is an even greater need and demand for strict construction due to the heightened need for reliability in such cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.). Finally, in cases in which life, liberty, or property, as used in the Fifth Amendment Due Process Clause, are involved, courts must "construe narrowly all delegated powers that curtail or dilute them." *Kent v. Dulles*, 357 U.S. 116,

129 (1958). *See also Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980) ("In the absence of a clear mandate . . . it is unreasonable to assume that Congress intended to give . . . unprecedented power").

With these principles in mind, it is readily apparent that none of the statutory provisions relied on by the court below supports a finding that Congress implicitly delegated lawmaking authority to the President. Clearly, none of these provisions expressly grants the President the authority to establish aggravating factors in a capital case. Moreover, in determining the implications of these provisions, it is necessary to consider the history of Congress' actions in enacting these articles. All of these articles were part of the Uniform Code of Military Justice as passed in 1950—22 years before this Court's decision in *Furman*—and they have not been substantially amended since that time.[21] Considered in this light, Congress did not intend (and could not have intended), in 1950, to grant the President the authority to establish aggravating factors in military capital cases satisfying Eighth Amendment principles which did not emerge until more than twenty years later. Articles 18, 36, and 56, therefore, provide no support for the lower court's decision.

***B. Congressional actions and inactions since the establishment of R.C.M. 1004(c) are insufficient to support a conclusion that Congress implicitly delegated its authority to the President to establish aggravating factors to be applied in military capital cases.***

In addition to citing articles 18, 36, and 56 of the U.C.M.J., the lower court relied on Congressional silence after R.C.M.

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[21] There were minor amendments to Article 18 in 1968. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1343. Article 36 underwent minor changes in 1979 and 1990. DOD Authorization Act of 1980, Pub. L. No. 96-107, 93 Stat. 804; National Defense Authorization Act of 1991, Pub. L. No. 101-510, 104 Stat. 1485.



1004 was promulgated in order to find that Congress had implicitly approved the President's actions. In doing so, the lower court cited this Court's opinion in *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961), for the proposition that "failure of Congress to complain about the content of regulations can be construed to be ratification." *Curtis*, 32 M.J. at 263. The lower court's reliance on *Power Reactor* is misplaced, however, because in that case, just as in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Haig v. Agee*, 453 U.S. 280 (1981), Congress had granted *prior explicit* authority to act in specific circumstances to reach a specified "end" and this Court only found *implicit* authority for and ratification of the agency's established "means" to reach the end. In this case, in contrast, Congress has never provided *prior explicit* authority for the President to establish the aggravating factors that are constitutionally required to narrow the class of persons eligible for the death penalty. Furthermore, since *Power Reactor*, this Court has explicitly stated on numerous occasions that, "[a]s a general matter, we are 'reluctant to draw inferences from Congress' failure to act.' " *Brecht v. Abrahamson*, __ U.S. __, 113 S.Ct. 1710, 1719 (1993) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988)).

Finally, in finding an implicit delegation of authority to the President, the lower court held that Congress' amendment of U.C.M.J. article 106a, 10 U.S.C. § 906a, to authorize death as a punishment for espionage amounted to a ratification of the aggravating factors promulgated by the President in R.C.M. 1004(c). In the 1985 amendments to Article 106a—made two years after the President set forth the aggravating factors listed in R.C.M. 1004(c)—Congress established three specific aggravating factors, but also added "[a]ny other factor that may be prescribed by the President by regulations under section 836 of this title (article 36)." Article 106a(c)(4). The lower court

found that the amendments to Article 106a constituted a ratification of R.C.M. 1004 for essentially three reasons. First, the capital punishment procedure outlined in Article 106a "conforms generally to the procedure the President previously had prescribed." *Curtis*, 32 M.J. at 262. Second, Congress "specifically authorized" the President to establish aggravating factors in addition to those stated in Article 106a. *Id.* Finally, the court relied on the House Conference Report, which stated in part:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provision of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punishment articles.

H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 8, *reprinted in* 1985 U.S.C.C.A.N. 571, 579.

Contrary to the lower court's conclusion, the express delegation of authority in Article 106a can easily be interpreted to express the congressional belief that, absent an express delegation, the President would be without authority to promulgate aggravating factors under Article 106a. *Cf. Kent v. Dulles*, 357 U.S. at 130. Moreover, the statement that the "conferees do not intend that . . . [the amendments to] Article 106a be construed as affecting the validity of the regulatory capital sentencing standards . . . for the other capital punishment articles," clearly indicates that there was no intent for Article 106a to be read as validating or invalidating R.C.M. 1004(c). In fact, the conferees clearly stated that Article 106a should not be read to affect other provisions. Thus, if R.C.M. 1004(c) was invalid prior to the amendments to Article 106a, it remains invalid.



Even assuming for the sake of argument that the express delegation in article 106a and the Conference Report represents ex post approval of the President's decision to establish the aggravating factors in R.C.M. 1004(c), this belated expression of approval cannot act as a retroactive delegation of authority. Legislative authority may be delegated—just like any other act of Congress—only in accordance with the procedures established in Article I of the Constitution, i.e., "bicameral passage followed by presentment to the President." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 954-55 (1983).

## III. ANY IMPLICIT DELEGATION OF AUTHORITY TO THE PRESIDENT TO ESTABLISH AGGRAVATING FACTORS IS INVALID BECAUSE CONGRESS HAS NOT SET FORTH SUFFICIENT STANDARDS TO GUIDE THE PRESIDENT IN HIS EXERCISE OF AUTHORITY.

A delegation of legislative authority to the President, or to any other agency, is valid only "[s]o long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.' " *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409); *see also American Power & Light, Co. v. Securities & Exchange Commission*, 329 U.S. 90, 142 (1946) (delegation is "constitutionally sufficient [only] if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.") Conversely, whenever Congress has provided some guidance in a "legislative act," this Court has refused to find an unconstitutional delegation of legislative authority. *Mistretta*, 488 U.S. at 373 (recognizing that, with the exception of two cases, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), this Court has never held that Congress has improperly delegated power).

In *Mistretta* this Court found that adequate standards had been laid down by Congress to guide the discretion of the Sentencing Commission. To name only a few, Congress by legislative act had set forth the goals and purposes of sentencing which should guide the Commission; it had specifically directed the Commission to establish guidelines to determine sentencing ranges and to set forth specific formulas for determining sentencing ranges including a baseline; it had directed the Commission, in formulating offense categories, to consider specific factors, and it prohibited consideration of other factors, 488 U.S. at 374-76; and it had itself "enumerated various aggravating and mitigating circumstances" to provide some guidance to the Commission. *Id.* at 377.

In contrast to the holding in *Mistretta*, this Court held in *Panama Refining* that the National Industrial Recovery Act had not authorized the President to prohibit transportation of excess petroleum in interstate and foreign commerce because the statute:

> establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress . . . thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.

293 U.S. at 415. Thus, the Court found that the attempted delegation of authority was unconstitutional because "[t]he Congress left the matter to the President without standard or rule . . . [which] permits such a breadth of authorized action as essentially to commit to the President the functions of a Legislature rather than those of an executive or administrative officer executing a declared legislative policy." *See also A.L.A. Schechter*



*Poultry*, 295 U.S. at 541-42 (authority conferred by legislative act which "supplies no standards" is "an unconstitutional delegation of legislative power").

Attempting (unsuccessfully) to solve the problem created by Congress' failure to establish sufficient guidelines for the President to follow in establishing aggravating factors, the lower court looked to the language of U.C.M.J. article 36, which "directs that the President 'shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with' the Uniform Code." *Curtis*, 32 M.J. at 263. Even assuming *arguendo* that Congress has implicitly delegated to the President its authority to establish aggravating factors in military capital cases, the langauge of Article 36 gives insufficient guidance to the President.

In reviewing this issue, it is important to consider what "principles of law" were recognized in capital trials in the district courts at the time the President adopted R.C.M. 1004 in 1984. After this Court's opinion in *Furman* in 1972, the first Congressional enactment relating to the death penalty came in 1974 when Congress authorized the death penalty for aircraft piracy "if the death of another person results from the commission or attempted commission of the offense." 49 U.S.C. § 1472(i) & (n).[22] In addition, Congress specifically set forth a list of aggravating factors, at least one of which had to be found before a death sentence could be imposed. 49 U.S.C. § 1473(c)(7).[23] Congress did not enact any other death penalty legislation until after the President established the aggravating factors applied to

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[22] 49 U.S.C. § 1472 was recodified as 49 U.S.C. § 46502 in July 1994.

[23] 49 U.S.C. § 1473 was recodified as 49 U.S.C. § 46503 in July 1994 and repealed in September 1994. The aggravating circumstances that now apply to aircraft piracy are found in 18 U.S.C. § 3592, which was enacted in September 1994.

petitioner. Thus, the 1974 aircraft piracy legislation is significant because it was the only available "principle of law" to be applied in capital sentencing hearings in the United States District Courts, potentially relevant to Article 36(a), in existence when R.C.M. 1004 was promulgated in 1984.[24]

Given this fact, the lower court's finding that the aggravating factors established by the President "reflect policy expressed by Congress in various statutes—including several punitive articles of the Uniform Code of Military Justice—and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty," *Curtis*, 32 M.J. at 263, is irrelevant. In the first instance, the "various statutes" enacted by Congress upon which the lower court relied to find (or create) congressional policy in support of R.C.M. 1004 do not (with the exception of Article 106a and 49 U.S.C. § 1472) include aggravating factors to be applied when death is an authorized punishment. Therefore, these non-capital statutes cannot possibly reflect congressional policy concerning aggravating factors to narrow the class of persons eligible for a sentence of death. Secondly, Article 106a and 49 U.S.C. § 1472 provided no guidance to the President. The aggravating factors in Article 106a could not have been considered by the President in 1984 because they were not enacted by Congress until 1985. Similarly, although 49 U.S.C. § 1472 existed in 1984, the aggravating factors established by

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[24] The 1974 congressional legislation is also significant for several other reasons. First and foremost, it clearly indicates Congress' recognition that, after *Furman*, aggravating factors were needed in order to comply with the requirements of the Eighth Amendment. Second, the 1974 legislation clearly shows that "[w]hen Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires." *Bell v. United States*, 349 U.S. 81, 83 (1955). Accordingly, if Congress had intended to reestablish the death penalty as a constitutionally acceptable punishment for offenses committed by those serving in the military, it would have done so in express terms.



the President in R.C.M. 1004(c) have almost no similarity to the aggravating factors set forth by Congress in 49 U.S.C. §§ 1472 and 1473.[25] Finally, the extent (if any) to which the aggravating factors of R.C.M. 1004(c) conform to the standards set forth in the Model Penal Code and state statutes is irrelevant to the issues of *congressional* intent and the rules established by Congress for application in the district courts. The question here is not whether the aggravating factors found in R.C.M. 1004(c) would be constitutional if established in an appropriate manner. Rather, the issue is whether the President had authority *ab initio* to establish those aggravating factors and whether Congress provided sufficient guidelines to exercise that authority, and the Model Penal Code and state statutes shed no light on this inquiry. *See generally Weiss*, 114 S.Ct. at 769 (Ginsburg, J., concurring) (quoting *Winters v. United States*, 89 S.Ct. 57, 59-60) (1968) (Douglas, J., opinion in chambers)) ("A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution").

## IV. PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH AND EIGHTH AMENDMENTS BECAUSE OF THE DIMINISHED RELIABILITY INHERENT IN ALLOWING A SENTENCE OF DEATH TO BE RENDERED BY A COURT-MARTIAL PANEL COMPOSED OF FEWER THAN TWELVE MEMBERS.

Pursuant to U.C.M.J. article 16(1)(A) and 18, a general court-martial may consist of as few as five members and has "jurisdiction to try persons . . . for any offense made punishable by this chapter and may . . . adjudge any punishment . . . including the penalty of death when specifically authorized by this chapter." Based on the authority of these provisions, petitioner was

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[25] The sole exception is that the aggravating circumstance that the defendant created a risk of death to more than one person is found in both § 1473 and R.C.M. 1004.

sentenced to die by a court-martial composed of only eight members. Because a death sentence imposed by a jury or a court-martial panel composed of fewer than twelve members violates the Fifth and Eighth Amendments, certiorari should be granted in petitioner's case.

Three relevant constitutional principles delimit this issue. First, as noted in preceding sections of this petition, the Eighth Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. at 305. Second, because the Eighth Amendment requires the consideration of the "evolving standards of decency," *see Trop v. Dulles*, 356 U.S. at 100, this Court has consistently acknowledged and executed its obligatory task of "examin[ing] capital sentencing procedures against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. 349, 357 (1977). Finally, the Fifth Amendment procedural due process analysis, much like the Eighth Amendment "evolving standards" inquiry, takes into consideration whether a criminal process "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Herrera v. Collins*, __ U.S. __, 113 S.Ct. 853, 864 (1993) (quoting *Medina v. California*, __ U.S. __, 112 S.Ct. 2572, 2577 (1992) and *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

This Court recognized long ago that the demand for twelve-person juries in capital cases is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958) (citation omitted); *see also Williams v. Florida*, 399 U.S. 78, 103 (1970) ("no state provides for less than 12 jurors [in capital cases]—a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decisions to impose the death penalty"). Moreover, considered in terms of the Eighth



Amendment concern with contemporary society and the standards that have evolved, it is apparent—as it was more than three decades ago when this Court decided *Speiser*—that the conscience of American society, as evidenced by its elected representatives in the legislatures, demands a twelve-person jury prior to imposition of a sentence of death. No state in this country that authorizes capital punishment permits imposition of death as a punishment by a jury composed of less than twelve jurors. *See* Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 63 n.298 (1980). This is true even in states that provide for smaller juries in non-capital criminal cases, and even in states where the jury plays only an "advisory" role in the capital sentencing process.[26] *See, e.g.*, Fla. Stat. § 913.10 (1985) ("Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other cases.") Moreover, twelve person juries are required in all capital cases in the United States District Courts. *See, e.g.*, 18 U.S.C. § 3593(b) and 21 U.S.C. § 848(i)(2). Thus, only in the military justice system could petitioner—or any other capital defendant—receive a death sentence from a panel or jury composed of less than twelve members.

In addition to being contrary to the conscience of society, petitioner's death sentence violates the Eighth Amendment because of the inherently diminished reliability of the determination by a panel composed of only eight members that death is the

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[26] Military judges, unlike judges in states where the jury is merely advisory, do not have authority to override the sentencing determination of the panel members. The jury's verdict, therefore, is absolutely binding on the court. While a capital defendant has no constitutional right to jury sentencing, *see, e.g., Harris v. Alabama*, 115 S.Ct. at 1037, *Spaziano v. Florida*, 468 U.S. 447, 463 (1984), when a jury is provided, the sentencing procedures used must comply with the "strictures dictated" by due process demands. *Morgan v. Illinois*, 504 U.S. 719, __, 112 S.Ct. 2222, 2229 (1992).

appropriate punishment.[27] In *Ballew v. Georgia*, 435 U.S. 223, 235 (1978), this Court opined that six member juries were *significantly* more likely to reach incorrect results than juries composed of twelve members. *Ballew* also recognized the inherent unfairness of smaller juror groups. *Id.* at 232-33. When considered in light of *Ballew*, a capital sentencing jury composed of less than twelve members is thus more susceptible to the influence of arbitrary and irrelevant factors that this Court has sought to exclude from the capital sentencing process. *See, e.g., Turner v. Murray*, 476 U.S. 28, 35 (1986) ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence").[28]

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[27] In addition, the reduction of the number of members also diminishes the likelihood that minority members will be selected, which is, of course, important from the perspective of the citizens selected as members, *see generally Powers v. Ohio*, 499 U.S. 400 (1991), and the perspective of a defendant who is a member of a minority race, such as petitioner. *See generally Batson v. Kentucky*, 476 U.S. 79 (1986).

[28] Moreover, Judge Wiss, in his dissent below, pointed out that the concern that arbitrary and impermissible factors may enter the sentencing deliberations room is very real in this case.

> On three of the issues, . . . I part company with the majority in two areas that relate to the bedrock for ensuring the fairness of a trial like this—a trial that ultimately may serve as the basis for executing this appellant: selection of and deliberations by court members. The first . . . raises the cancerous possibility that command influence inside the members' deliberation room during their consideration of a sentence so skewed the legally required voting procedures that it undermined the fundamental fairness of those proceedings; two other issues raise the specter of the insidious possibility of racial . . . and gender . . . discrimination infecting the convening authority's selection of the court-members who ultimately tried appellant. . . . As to each of these issues, therefore, I am compelled to dissent from the majority opinion.

*Loving*, 41 M.J. at 310 (Wiss, J., dissenting).



The susceptibility to arbitrary influence is especially heightened for military capital sentencing jurys because of the inherent peril of command influence. *See* U.C.M.J. article 37, 10 U.S.C. § 837 (unlawful influence of the action of a court is prohibited). Command influence is a term of art in the military, but generally implies a commander's improper influence based on rank and position of authority (either intentionally or unintentionally) on the decisions of court-martial members. It is an innate problem because all panel members are selected—and supervised in their military careers—by the general court-martial convening authority, *see* U.C.M.J. article 25(d)(2), 10 U.S.C. § 825(d)(2), who is typically the base commander and a general officer.[29] In addition to selecting the panel members, the convening authority is also the person who makes the prosecutorial determination that an accused shall be tried by a general court-martial for a capital offense, *see* U.C.M.J. article 22, 10 U.C.M.J. § 822, and who must approve any resulting death sentence, *see* U.C.M.J. article 60, 10 U.S.C. § 860. Thus, a capital defendant in the military goes on trial for his life before jurors who are hand-picked by the base commander, who are aware that the base commander has already determined that the offenses are atrocious enough that the government should seek the death penalty, and who must answer to the base commander in their career development. *See* Hearings on S. 857 and H.R. 4080, 81st Cong., 1st Sess. (1949) *reprinted in* Index and Legislative History of the Uniform Code of Military Justice, at 78-85 (1950) (Testimony of George Speigelberg for the Special Committee on Military Justice, American Bar Association).[30] Because of this

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[29] The convening authority in petitioner's case was a Major General (two stars).

[30] Mr. Speigelberg observed:

> Today, the average convening power of a general court martial . . . is a divisional commander. As a matter of fact, . . . the commanding general appoints or controls the appointment of

intrinsic obstacle to obtaining a fair and impartial jury in capital trials in the military, heightened scrutiny of the deliberations of the court-martial panel is necessary.[31] While requiring a court-martial panel composed of a minimum of twelve members in capital cases will not eradicate command influence concerns, it will greatly diminish the risk of arbitrary and capricious imposition of death as a punishment.

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> the trial judge advocate who is the prosecutor, . . . and of the court which tries the man accused of crime.
>
> That court is chosen exclusively from members of the commanding officer's command. They look, properly and necessarily, to the commanding officer for promotion, for assignment, for efficiency ratings, and for quarters. Indeed, it is no exaggeration to say that their future in the Army is entirely dependent of their commanding officer's good will.
>
> Now, if it please the committee, that situation, so long as it is allowed to exist, carries in it the germ of injustice.

*Id.* at 76-77.

[31] As noted, Judge Wiss did detect command influence in this case, albeit by the President of the panel as opposed to the convening authority.



## CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

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June 2, 1995.

**APPENDIX A**

U.S. COURT OF APPEALS FOR THE ARMED FORCES

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No. 68,033.
CMR No. 8901123.

UNITED STATES, APPELLEE

v.

DWIGHT J. LOVING, PRIVATE U.S. ARMY, APPELLANT.

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Argued Sept. 30, 1993.
Decided Nov. 10, 1994.

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Accused was convicted by general court-martial, Stephen V. Saymisch, J., of premeditated murder, felony murder, attempted murder, and robbery. Accused was sentenced to death. The United States Army Court of Military Review, 34 M.J. 956, affirmed. On reconsideration, the United States Army Court of Military Review, DeGiulio, Senior Judge, 34 M.J. 1065, denied petition for reconsideration. Review was granted. The United States Court of Military Appeals, Gierke, J., held that: (1) court members' posttrial affidavits were not competent evidence as to any improper voting procedures during sentencing deliberations; (2) there was no unlawful command influence; (3) accused's confessions were not improperly coerced or involuntary; (4) evidence was lawfully seized from accused's girlfriend's apartment; (5) accused was not prejudiced by military judge's characterization of accused's duty performance as an aggravating circumstances; (6) military judge did not abandon his role as a neu-

tral officer; (7) accused was not denied a fair trial; and (8) death sentence did not violate the Constitution.

Affirmed.

SULLIVAN, C.J., filed an opinion concurring in part and in the result.

WISS, J., filed a dissenting opinion.

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For Appellant: *Captain Teresa L. Norris* (argued); *Lieutenant Colonel James H. Weise, Major Fran W. Walterhouse, Captain David L. Thomas* (on brief); *Captain Roy H. Hewitt.*

For Appellee: *Major Joseph C. Swetnam* (argued); *Colonel Dayton M. Cramer* and *Lieutenant Colonel Joseph A. Russelburg* (on brief); *Major James L. Pohl* and *Captain John G. Giovannelli.*

Amicus Curiae on behalf of Appellant; John H. Blume (on brief); George H. Kendall—For NAACP Legal Defense Fund.

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**ON MANDATORY REVIEW**

***Opinion of the Court***

GIERKE, Judge:

1. A general court-martial composed of officers convicted appellant, contrary to his pleas, of premeditated murder, felony murder, attempted murder, and robbery (specifications, in violation or Articles 118, 80, and 122, Uniform Code of Military Justice, 10 USC §§ 918, 880, and 922, respectively. The court-martial sentenced appellant to a dishonorable discharge, total forfeitures, and to be put to death.

The Court of Military Review* affirmed the findings and sentence twice. 34 MJ 956 (1992), *on recon.*, 34 MJ 1065 (1992), The record is before us for mandatory review pursuant to Article 67(a)(1), UCMJ, 10 USC § 867(a)(1) (1989). Appellant has assigned 70 errors, each of which is discussed seriatim. Having found no prejudicial error, we affirm the findings of guilty and the sentence of death.

***Factual Background***

On the evening of December 11, 1988, appellant robbed at gunpoint a 7-Eleven convenience store in Kileen, Texas, and obtained approximately $38.00. About an hour later, he robbed a second 7-Eleven store in Kileen, also at gunpoint, and obtained approximately $52.00.

Disappointed with the small amounts of money he had obtained from the 7-Eleven stores, he decided to rob taxicab drivers. At about 8:00 p.m. on the night of December 12, appellant called a cab to take him from the Handy Grocery Store in Kileen to Fort Hood. The cab driver was an active-duty soldier, Private

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* This court became a Court of Criminal Appeals effective October 5, 1994. Pub.L. No. 103-337, § 924(b), 108 Stat. 2663. The name of the court at the time of its decision in this case will be used herein.

(PVT) E-2 Christopher L. Fay, working for extra money. Appellant directed Fay to a secluded area on Fort Hood and, at gunpoint, demanded all his money. After receiving an unknown amount of money from Fay, appellant shot him in the back of the head. While watching the blood "gushing out" of the back of Fay's head, appellant shot him in the back of the head a second time. Fay died as a result of the gunshots. His body was discovered by another soldier at Fort Hood about 30 minutes later.

Appellant fled from the cab to his barracks room, counted the money, and called for a second cab about 8:15 p.m. The driver of the second cab was Bobby Sharbino, a retired Army sergeant. Appellant directed Sharbino to a secluded street in Killeen and, at gunpoint, took his money pouch, wallet, and a green BIC cigarette lighter. He ordered Sharbino to lie down on the seat and shot him in the head, killing him.

2. After killing Mr. Sharbino, appellant went to the home of his girlfriend, Ms. Nadia Pessina. They and a group of friends went to the Vegas Club, where Ms. Pessino was employed, to pick up her paycheck. They then went to another club, the Nubia Temple, where appellant became involved in an altercation with another male patron because the patron was staring at Ms. Pessina. During the altercation, appellant drew his pistol and invited the patron to go outside. As the patron advanced toward appellant, appellant backed up, stumbled over a chair, and dropped his pistol on the ground, causing it to discharge.

Appellant and Ms. Pessina hurriedly left the Nubia Temple. They went to a cab stand across the street from the Chapparal Club and took a cab, driven by Howard Douglas Harrison, to Ms. Pessina's residence, located at 909 Mimosa Street in Killeen. Mr. Harrison had difficulty pronouncing "Mimosa" and needed help to find the street. Appellant dropped off Ms. Pessina near her residence. After pulling a gun, he directed Harrison to a secluded street, demanded money, and took Harrison's wallet and coin changer, obtaining about $94.00. Appellant jerked Harrison's



head around and told him to open his mouth. Believing that he was about to be killed, Harrison grabbed the pistol. During the ensuing struggle, Harrison gained possession of the pistol after it went off. Then he attempted to shoot appellant, but the pistol would not fire. Harrison fled the scene, with appellant chasing him. After Harrison hit him, appellant ran to Ms. Pessina's house, having regained possession of the pistol.

Harrison returned to his cab and reported to his dispatcher that he had been robbed and that his assailant was going toward Mimosa street. Appellant spent the remainder of the night at Ms. Pessina's residence.

In the morning appellant took a cab back to his unit and accompanied his unit on field training. At about 3:00 p.m. he rode back from the field to the unit motor pool with his supervisor, Staff Sergeant (SSG) Barshaw. During the 35-40 minute ride from the field, appelant told SSG Barshaw that he had left his weapon and his field jacket behind. SSG Barshaw told him that he would retrieve them later and bring them to appellant.

At about the time that appellant was returning from the field with SSG Barshaw, a joint investigative team composed of members of the FBI, Army Criminal Investigation Command (CID), local police, and Texas Rangers were in Ms. Pessina's neighborhood. They had received a general description of appellant and Ms. Pessina from Mr. Harrison, the surviving cab driver. They talked to people at the Handy Grocery Store and in the neighborhood and were told, "Yeah, that's Nadia and she has a black boyfriend." They saw Ms. Pessina with her friend, Ms. Ira Printers. They asked her to state her name and she identified herself. They asked her where she lived, and she told them that she lived at 909 Mimosa Street. At that point "something clicked" which "connected" Ms. Pessina to Mr. Harrison's report. They asked her to come with them to the Killeen police station and she agreed.

3. The Killeen police did not consider Ms. Pessina a suspect at the time. She gave a statement to the police in which she

described her activities, including the cab ride to her residence, but she did not implicate appellant in any crimes. She stated that, after the cab driver dropped her off at her residence, appellant left in the cab to buy her some cigarettes, returned about 5 minutes later, and then spent the night with her.

At the end of the interview, at about 6:45 p.m., she signed a written consent to a search of her residence. At trial, Ms. Pessina, whose command of the English language is limited, testified regarding her consent as follows:

> I don't know if they have to have a warrant, or if they no need to have a warrant; I no know that. . . . But then—but, when I—no, when I was to the police station, they told me . . . that, if I want, I can get a warrant, to my house. And, they say: But, they gonna look, anyway, so . . . I let them look.

At about the time that the interview of Ms. Pessina was ending, appellant was apprehended in the unit motor pool by CID Special Agent (SA) Schnayerson. He was transported to the CID office, advised of his rights, and at about 7:30 p.m. waived his rights and agreed to make a statement. He denied any involvement for about 30 minutes. After SA Schnayerson asked appellant who would take care of the families of the murdered cab drivers, appellant confessed. Appellant's confession was videotaped.

In his confession appellant told SA Schnayerson that the pistol used in the crimes was hidden in a paper bag behind Ms. Pessina's residence. He also mentioned that he had worn black gloves during the offenses and that he took a ski mask to the 7-Eleven stores but decided not to wear it. He told SA Schnayerson that he only took cash from PVT Fay. He took money, a wallet, and a green BIC cigarette lighter from Mr. Sharbino. He threw the wallet into a dumpster next to his barracks but left the green BIC lighter at Ms. Pessina's residence. He told SA Schnayerson that he kept Mr. Harrison's wallet and its contents.



At about 9:00 p.m., while appellant was still being interviewed, SSG Barshaw returned to the unit's field location and retrieved appellant's field jacket and weapon. He found a coin changer after it fell out of a pocket of the field jacket. Suspecting some significance since he had been present when appellant had been apprehended in the motor pool, SSG Barshaw gave the field jacket and coin changer to his first sergeant and a CID agent. At trial, Mr. Harrison identified the coin changer as the one taken from him by appellant.

The taped interview of appellant ended at about 10:00 p.m., at which time appellant went to sleep on a soft in the CID office. From 10:00 p.m. until 6:00 a.m., the CID prepared a written transcript of the videotaped confession.

4. Meanwhile, a search outside Ms. Pessina's residence had yielded appellant's pistol, which was later identified as the weapon used in the murders and robberies; several spent and unspent bullets; and a blood-stained man's jacket. At 11:50 p.m., Ms. Pessina returned to the Killeen police station, was advised of her rights as a suspect, and gave a second statement. She admitted driving appellant to the vicinity of the two 7-Eleven stores on December 11. She admitted seeing appellant with a pistol at an unknown time prior to the murders and robberies. She said that appellant had told her on December 12 that "he was going to go and get some money" and "he was going to go kill somebody." Ms. Pessina said that she did not believe that appellant was serious. When appellant left the house in the early evening of December 12, Ms. Pessina "felt a bulge in his waistband" that she thought was a pistol. When appellant returned, he said, "I got the money. . . . I shot him."

After completing her second statement, she signed a written consent form for a second search of her residence, which occurred at about 2:15 a.m. on the morning of December 14. The second search resulted in seizure of a black ski mask, a pair of gloves, and a green BIC cigarette lighter.

Appellant was awakened in the CID office at about 6:00 a.m. on December 14. From about 6:15 to 7:15 a.m. he reviewed the 14-page transcript of his confession. He then signed it and swore to it. At 7:45 a.m. he was interviewed by Investigator John Wedge, a member of the Killeen police, and again confessed.

On December 16, Ms. Pessina gave a third statement to the police in which she said that appellant told her he had "shot two people" but she did not believe him. She also said that while in the cab on the way to 909 Mimosa, appellant "had the pistol I believe in the front of his pants or on the side and he pulled it out and keep it in his hand on the seat." She stated further, "I don't know what he was going to do, but I had a bad feeling about it."

5. The court-martial convicted appellant of the following Charges and specifications:

***Charge I***

Specification 1—Premeditated murder of Christopher L. Fay
Specification 2—Premeditated murder of Bobby Sharbino
Specification 3—Felony murder of Christopher L. Fay
Specification 4—Felony murder of Bobby Sharbino

***Charge II***

Specification—Attempted murder of Howard Douglas Harrison

***Charge III***

Specification 1—Robbery of Christopher L. Fay
Specification 2—Robbery of Bobby Sharbino
Specification 3—Robbery of Howard Douglas Harrison
Specification 4—Robbery of Genevieve Grant (7-Eleven cashier)
Specification 5—Robbery of Kimberly Gray and Guy Ensinger (7-Eleven cashiers)



The findings of guilty of the premeditated murder of Bobby Sharbino (specification 2 of Charge I), the felony murder of Christopher L. Fay (specification 3 of Charge I), and the felony murder of Bobby Sharbino (specification 4 of Charge I) were announced as unanimous. The fraction of the court voting for all other findings of guilty was not announced.

After the findings were announced, the military judge dismissed as multiplicious specification 1 of Charge I (premeditated murder of Fay), specification 4 of Charge I (felony murder of Sharbino), and specification 1 of Charge III (robbery of Fay). A sentencing hearing was conducted in accordance with RCM 1004, Manual for Courts-Martial, United States, 1984 (Charge 2), after which the court-martial, by unanimous vote, sentenced appellant to a dishonorable discharge, total forfeitures, and "to be put to death."

Additional relevant facts are set out below in connection with specific issues.

**ISSUE I**

WHETHER APPELLANT'S SENTENCE OF DEATH MUST BE SET ASIDE AND ONLY A LIFE SENTENCE AFFIRMED BECAUSE THE PANEL MEMBERS FOLLOWED IMPROPER VOTING PROCEDURES DURING THE SENTENCING DELIBERATIONS.

6. Based on *ex parte* affidavits obtained from 3 of the 8 court members almost 4 years after the court-martial, appellant now contends that the members did not vote at all on aggravating factors, did not follow the correct procedure for proposing sentences, did not vote first on the least severe sentence proposal, voted on proposals for life imprisonment and the death sentence at the same time, and reconsidered a less than unanimous vote to impose the death sentence without following the procedures for reconsideration.

### *A. Procedural Rules*

In order to adjudge a death sentence, members must follow the voting procedures set forth in RCM 1004 (Change 2) and 1006. RCM 1004(b)(7) provides:

> In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with RCM 1006.

Under RCM 1006(c), "[a]ny member may propose a sentence." When the voting begins, RCM 1006(d)(3)(A) provides:

> All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

RCM 1006(d)(4) provides that a death sentence must be adopted by unanimous vote and a sentence to life imprisonment requires a consensus of three-fourths of the members. *See Garrett v. Lowe*, 39 MJ 293 (CMA 1994).

### *B. The Instructions*

7. During his sentencing instructions, the military judge informed the members that "a death sentence may not be adjudged unless all the court members find beyond a reasonable doubt



that one or more of the aggravating circumstances existed." He then described the three aggravating circumstances listed on the sentence worksheet and explained that "all the members of the court must agree beyond a reasonable doubt that one or more of the aggravating circumstances that I just mentioned existed at the time of the offenses or resulted from the offenses." He further explained:

> It is not sufficient that some members find that one aggravating circumstance existed while the remaining members find that a different aggravating circumstances existed. Rather, all of you must find beyond a reasonable doubt that the same aggravating circumstance or circumstances existed before a sentence of death may be adjudged.

After further instructions repeating the definition of reasonable doubt and describing the aggravating circumstances, he gave the following procedural instructions:

> You may consider all the evidence that has been presented to you in this case, including evidence presented prior to the findings of guilty in this case, as well as evidence, of course, presented after the findings during the sentencing phase of the trial. Your deliberation on the aggravating circumstances should properly include a full and free discussion of all the evidence that has been presented to you.
>
> After you have completed your discussion, then voting on each aggravating circumstance must be accomplished by secret written ballot. All of the members must vote, none of you are allowed to abstain. If you fail to find unanimously that at least one aggravating circumstance existed, then you may not adjudge a sentence of death. If, however, you determine that

> at least one of the aggravating circumstances existed, then you may consider, along with all other appropriate sentence possibilities, for example, punitive discharge and forfeitures in this case, whether a sentence of death should be adjudged. In this regard, you may not adjudge a sentence of death unless all of you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including such circumstances as you have found existed in the first step of the procedure. . . .

The military judge then listed six other "nonstatutory" aggravating circumstances as well as the extenuating and mitigating circumstances. The military judge concluded this portion of the instructions by again reminding the members that "[a] sentence of death may be adjudged only upon the unanimous vote of all the members."

8. Turning to the sentence worksheet, the military judge explained:

> Part A are those aggravating factors that I mentioned and at least one of them has to be found beyond a reasonable doubt, a unanimous finding on that particular aggravating circumstance before the rest of the procedures even apply in this case, and that would be the death sentencing procedures. All right. So that's step one.
>
> Step two, then, as you see on the worksheet, is this balancing of the aggravating and mitigating—extenuating and mitigating factors, it should be. It should read, Balancing of Aggravating and Extenuating and Mitigating Factors. There's a word left out. You might want to jot that in on the title under Part B. But in any case, that's step two, and what's reflected under Part B on the worksheet is step two of this process.



> Then, you move down to Part C, which is the actual sentence and that—that is step three, as I say, and I'll go into that in just a few moments with you in how to go about then determining an actual sentence in this case.

After instructing the members on forfeitures and punitive discharges, the military judge then gave the following procedural instructions for "step three," voting on sentences:

> When you close to deliberate and vote, only the members will be present during your closed session deliberations and your deliberations should begin, first, with a full and free discussion on the general subject of sentencing. The influence of superiority in rank shall not be employed in any manner in an attempt to control the independence or judgment of any other court member. When you have completed that discussion, then any member who desires to do so may propose a sentence and you do that by writing it down on a slip of paper, and that would be a complete or entire sentence. The idea behind that instruction is you shouldn't piecemeal the punishments. The junior member will collect those proposed sentences, submit them to the president, who will arrange them in the order of severity.
>
> You then vote on those proposed sentences by secret written ballot. All of you must vote, none of you are allowed to abstain. You vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence. For a sentence to death, all of you must concur in the sentence. For a sentence that includes life imprisonment, which is the mandatory minmum sentence, three-fourths of the members must agree on a sentence and that would be, because there are eight, six of you must agree.

The junior member will then collect and count the votes. The court is then checked by the president, who will immediately announce the result of the ballot to the rest of the court members. If you vote upon all of the proposed sentences without arriving at the required concurrence, then you repeat the process of proposing and voting on the sentences. The second time around, a member may desire—if a member desires to do so, you may vote on all new proposals or proposals rejected by an earlier vote. But remember, unanimous—a death sentence, unanimous vote, all the members, three-quarters for a sentence that includes life in prison.

Now, you may reconsider your sentence, no matter what it is, you may reconsider that sentence at any time before it is announced in open court by the colonel. If that occurs, then the proper procedure would be, just as I've indicated on findings, and that procedure would be: Number one, don't try to do it yourselves; number two, come back out, open the court, tell me, in very general terms, colonel, that a member, no specifics, please, a member has requested reconsideration. Then, at that time, I'll tell you what those instructions are. They are somewhat lengthy and involved, a little complicated, so I won't give them now, remember though that, legally, any member may request reconsideration. Please, though, remember the process.

### *C. The Announcement of the Sentence*

9. The court members closed to determine a sentence at 1:14 p.m. Four hours and 41 minutes later, at 5:55 p.m., they informed the military judge that they had arrived at a sentence. The president of the court-martial then announced that they had unanimously found, "beyond a reasonable doubt," all three aggravating factors. Then he announced that the court-martial had found unanimously that "any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including the factors as found indicated in Part A." Finally, the president announced the sentence: "To forfeit all pay and allowances, to be discharged from the service with a Dishonorable Discharge, to be put to death." A copy of the sentence worksheet is attached as an Appendix.



### *D. The Post-Trial Affidavits*

10. The sentence was adjudged on April 3, 1989. In February 1993, appellate defense counsel obtained affidavits from Colonel Aylor, the court-martial president; and Major Napoli and Captain (CPT) Williams, members. Defense Appellate Exhibits (Def.App.Ex.) F, G, and H.

Colonel Aylor's affidavit states the following:

> The jury received instructions from the judge on sentencing and then we went into the jury room. I explained to the other members of the jury what we were supposed to do and how we would do it. I also reminded everyone that the minimum sentence was life imprisonment as explained to me by the judge. We did not re-vote and [sic] aggravating factors during the sentencing procedure. . . . The first vote resulted in the following: 7 votes of reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and death; 1 vote of reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and life imprisonment. The judge had explained before we adjourned that the death penalty required a unanimous vote. . . . After another 1½ hours of review, I asked if everyone was

prepared to vote again. They said they were. . . . The second vote resulted in the following: 8 votes of reduce to E1, forfeiture of all pay and allowances, bad-conduct [sic] discharge and death.

Major Napoli's affidavit states the following:

> Following Colonel Aylor's remarks, we voted by secret written ballot. Colonel Aylor counted the ballots.
>
> Since there was not a consensus, we discussed the facts and evidence in the case again. Afterwhich [sic] Colonel Aylor instructed us to vote again. This vote resulted in an unanimous sentence to death. . . .

Captain Williams' affidavit states the following:

> We discussed the facts and evidence in the case. Then Colonel Aylor told us that we each had two options, we could vote life imprisonment or death, but that death required a unanimous vote.
>
> Following Colonel Aylor's remarks, we voted by secret written ballot. Colonel Aylor counted the ballots and the result was seven in favor of death and one in favor of life imprisonment.
>
> Since there was no consensus, we discussed the facts and evidence in this case again. We did not seek help from the military judge. Instead, following our continued deliberations, Colonel Aylor instructed us to vote again. We voted using the same procedure as before, picking between death and life imprisonment. The result of the second vote was eight in favor of death and zero in favor of life. . . .

Based on the affidavits, appellant argues that the court-martial members did not follow the judge's procedural instructions.



More specifically, he argues that the members did not vote at all on the aggravating factors, did not follow the correct procedure for proposing sentences, did not vote first on the least severe proposed sentence, voted on the sentences to life imprisonment and death at the same time, and revoted after a 7-1 vote to impose the death sentence without following the procedures for reconsideration.

We conclude that the affidavits are ambiguous at best. For example, it is unclear what COL Aylor means when he speaks of a "revote" on aggravating factors. Likewise, it is unclear whether the 7-1 "vote" was actually the first round of proposed sentences or a permissible "straw poll." *See United States v. Lawson,* 16 MJ 38, 41 (CMA 1983).

11. Court members "are presumed to follow the military judge's instructions" *United States v. Holt,* 33 MJ 400, 408 (CMA 1991). In this case that presumption is reinforced by the sentence worksheet and the president's announcement that all members found that the aggravating factors were proven beyond a reasonable doubt, that all members found that the aggravating circumstances outweighed the extenuating and mitigating circumstances, and that all members voted to impose the death sentence. No court member disputed the president's announcement at the time.

We recognize that the presumption of compliance with the military judge's instructions can be rebutted by competent evidence to the contrary. The pivotal question with respect to Issue I is whether the affidavits are competent evidence. In this regard, Mil.R.Evid. 606(b), Manual, *supra,* provides:

> Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the mem-

> ber to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. . . .

Mil.R.Evid. 606(b) is taken from Fed.R.Evid. 606(b). Except for changes to reflect court-martial terminology, Mil.R.Evid. 606(b) is identical to Fed.R.Evid. 606(b) with one addition: the reference to unlawful command influence. *See* Drafters' Analysis of Mil.R.Evid. 606, Manual, *supra* at A22-41 (Change 2). The identical language is consistent with the statutory mandate in Article 36(a), UCMJ, 10 USC § 836(a), that the President prescribe procedures which, "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . ." By adopting the language of Fed.R.Evid. 606(b) in Mil.R.Evid. 606(b), the drafters clearly intended that the federal rule apply to courts-martial, with an additional provision for cases involving unlawful command influence.

12. The purpose of this rule is to protect "freedom of deliberation," protect "the stability and finality of verdicts," and protect court members "from annoyance and embarrassment." *United States v. Bishop*, 11 MJ 7, 9 (CMA 1981).

Appellant makes three arguments for considering the affidavits in this case. First, he argues that the rule is only intended to protect the subjective thoughts of the court members and does not preclude inquiry into objective factors such as voting procedures. Second, he argues that the affidavits indicate unlawful command influence on the part of the president, Colonel Aylor. Third, he argues that "death is different" and that Mil.R.Evid.



606(b) should not be strictly applied if there is evidence of a procedural irregularity in imposition of the death sentence. We find these arguments unpersuasive. Based on our reivew of judicial and legislative history, we hold that the affidavits are not competent evidence.

With regard to appellant's first argument, there is some authority among the precedents of this Court for the proposition that affidavits of court members may not be considered to support an allegation that the court members used erroneous procedures during deliberations. *See United States v. West*, 23 USCMA 77, 48 CMR 548 (1974) (opinion by Duncan, C.J., with Quinn, J., concurring in the result and Ferguson, S.J., not participating). Two Courts of Military Review have permitted asking court members whether voting was by secret written ballot, but both cases have justified such an inquiry on the ground that the possibility of oral voting raises the possibility of unlawful command influence. *See United States v. Greene*, 36 MJ 1068, 1071 (1993 ACMR9), *aff'd on other grounds*, 41 MJ 57 (CMA 1994); *United States v. Martinez*, 17 MJ 916, 918, 919-20 (NMCMR 1984). Most recently, in a capital murder case, the Navy-Marine Corps Court of Military Review has refused to consider post-trial evidence that court members did not follow the proper procedure for reconsidering their findings. *United States v. Thomas*, 39 MJ 626 (1993) (on motion).

The federal Courts of Appeals have uniformly refused to consider evidence from jurors indicating that the jury ignored or misunderstand instructions in criminal cases. *See United States v. Miller*, 806 F.2d 223, 225 (10th Cir.1986) (rejected general allegation by juror that she may not have understood judge's instructions); *United States v. Neary*, 552 F.2d 1184, 1190 (7th Cir.), *cert denied*, 434 U.S. 864, 98 S.Ct. 197, 54 L.Ed.2d 139 (1997) (rejected evidence that juror may not have understood burder of proof in criminal case); *United States v. Stacey*, 475

F.2d 1119, 1121 (9th Cir.1973) (rejected evidence that three jurors did not understand that "intent to defraud" was element of offense); *United States v. Dioguardi*, 492 F.2d 70 (2d Cir.) (rejected opinions of psychiatrists that juror was mentally incompetent and incapable of understanding instructions), *cert. denied*, 419 U.S. 829, 95 S.Ct. 49, 42 L.Ed.2d 53 (1974); *Dobbs v. Zant*, 720 F.Supp. 1566, 1568-69 (NDGa. 1989) (rejected evidence that jury may have considered prior convictions contrary to judge's instructions), *aff'd*, 963 F.2d 1403 (11th Cir.1991), *rev'd on other grounds*, __ U.S. __, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993). *See generally* 65 ALR Fed. § 10 at 852 (1983). As noted by Chief Judge Sullivan in his separate concurrence, 41 MJ at 303, several state courts have held, even in capital cases, that evidence obtained from jurors concerning the deliberative process may not be used to impeach the verdict.

13. It may be improper even to ask jurors whether they followed the judge's instructions. *See United States v. Greer*, 620 F.2d 1383, 1385 n. 2 (10th Cir.1980). *See also* RCM 922(e) and 1007(c) ("Except as provided in Mil.R.Evid. 606, members may not be questioned about their deliberations and voting.").

Appellant argues that Fed.R.Evid. 606(b) and its military counterpart preclude inquiry only into the jury's compliance with substantive instructions such as what the jury may consider, but do not preclude inquiry into the jury's compliance with objective instruction such as voting procedures. This objective-subjective distinction was expressly rejected in *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). In *Tanner* the Supreme Court traced the legislative history of Fed.R.Evid. 606. They observed that Congress rejected an expansive House version of the rule which would have allowed juror testimony regarding "objective juror misconduct." The House version specifically drew a distinction between inquiry into "the mental processes" of jurors and "what happened in terms of conduct in the jury room." 483 U.S. at 123, 107 S.Ct. at 2749. The House



version would have allowed a juror to testify as to "what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations." 483 U.S. at 123-24, 107 S.Ct. at 2749, *citing* S.Rep. No. 93-1277, 2d Sess., at 13-14, U.S.Code. Cong. & Admin. News 1974, pp. 7051, 7060. Congress rejected the House version and instead adopted the more restrictive Senate version, which prohibits all juror testimony about what occurred during deliberations, except for testimony about extraneous influences. 483 U.S. at 125, 107 S.Ct. at 2750.

The Supreme Court made it clear in *Tanner* that Fed.R.Evid. 606(b) is a blanket prohibition on juror testimony to impeach a verdict. The only exception in that rule is for evidence of extraneous influence. Absent that exception, a juror "may not testify as to *any matter* . . . occurring during the course of the jury's deliberations." Fed.R.Evid. 606(b) (emphasis added).

14. Fed.R.Evid 606(b) makes incompetent any testimony from jurors about the decision-making process of the jury as well as the mental processes of individual jurors. Following the Supreme Court's decision in *Tanner*, at least two federal Courts of Appeals have been refused to inquire into allegations of irregularities in jury voting procedures. In *United States v. Ortiz*, 942 F.2d 903, 913 (1991), *cert. denied*, __ U.S. __, 112 S.Ct. 2966, 119 L.Ed.2d 587 (1992), the Fifth Circuti rejected an affidavit of a juror alleging oral voting, voting on all counts together instead of voting on each count presented against each defendant, and alleging that the verdict announced in court, was not her verdict. The court in *Ortiz* specifically noted that the "the Advisory Committee notes accompanying 606(b) single out voting as such a 'component of deliberation.' " In *United States v. Ford*, 840 F.2d 460 (7th Cir. 1988), the court rejected evidence that votes were taken before all evidence was reviewed and "votes were cast verbally." The court held that it "will not inquire into the jury's

deliberative process, including arguments, statements, discussions, mental and emotional reactions, and *votes*, in the absence of a claim of external influence." *Id.* at 465 (emphasis added). Based upon the foregoing, we are satisfied that the overwhelming weight of authority prohibits inquiry into the voting procedures actually used by court members to arrive at a sentence.

Since Mil.R.Evid. 606 was taken from Fed.R.Evid. 606, that same blanket prohibition applies to testimony of court members about "any matter," including voting procedures, "occurring during the course of the deliberations." Accordingly, we hold that the affidavits of Colonel Aylor, Major Napoli, and Captain Williams may not be cpnsidered except for the limited purpose of determining if extraneous influence or unlawful command influence may have been injected into the deliberations. *United States v. Accordino*, 20 MJ 102, 105 (CMA 1985).

Appellant has not alleged that Colonel Aylor exercised unlawful command influence during the deliberations. Nevertheless, our dissenting brother detects "a distinctly disconcerting aroma" of unlawful command influence "emanating" from the affidavits of the court members. 41 MJ at 315 (Wiss, J.). We note first that the reference to unlawful command influence in Mil.R.Evid. 606 (b) is not limited to "external command influences." It also applies to "use of rank by a court member to pervert military justice." *United States v. Accordino*, 20 MJ at 104. *See United States v. Carr*, 18 MJ 297, 302 (CMA 1984) (allegation that president of court-martial used influence of rank to pressure other members during deliberations falls within "unlawful command influence" exception to Mil.R.Evid. 606 (b)).

15. Our review of the affidavits is limited to determining if there is any evidence of unlawful command influence. *United States v. Accordino, supra* at 105. We hold that the affidavits do not raise an issue of unlawful command influence in this case. Colonel Aylor was the president of the court-martial, and as such had certain administrative duties and discretion in the performance of those duties. His authority as president included "the discretion to call for a vote when, in [his] judgment, discussion of the issues is complete or further debate would be pointless." 20 MJ at 105. The affidavits reflect no more than Colonel Aylor's proper exercise of authority as president to preside over the deliberations. The affidavits also contain no evidence that Colonel Aylor used his "rank to 'enhance' an argument—*i.e.*, to coerce a subordinate to vote in a particular manner." *Id.* at 105. In this regard, it is important to remember that full and free discussion cuts both ways. "Senior ranking court members, like their jurors, are free to express their opinions in the strongest terms and to engage in the most robust discussions without fear of retribution or appellate sniping." *Id.*. at 105.



Our dissenting brother relies on the oral arguments of appellate counsel to conclude that "the command influence issue is squarely before the Court." 41 MJ at 315. Suffice it to say, oral arguments are not evidence. There must be more than a mere allegation of command influence to raise the issue; there must be evidence. *See United States v. Levite*, 25 MJ 334, (CMA 1987) (Cox, J., concurring) ("[A]n appellant's unsubstantiated assertion that unlawful command influence exists is not going anywhere. . . ."). There is absolutely no suggestion in the affidavits that Colonel Aylor exercised unlawful command influence.

16. We turn finally to appellant's argument that "death is different." Appellant argues that the nature of the death sentence requires heightened scrutiny of the process by which it is imposed. He cites the Supreme Court's observation in *McDonald v. Pless*, 238 U.S. 264, 268-69, 35 S.Ct. 783, 785, 59 L.Ed. 1300 (1915), "that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.' " *Mattox v. United States*, 146 U.S. 140, 148, 13 S.Ct. 50, 52, 36 L.Ed. 917 (1892), was cited to support this statement: We do not believe that *McDonald v.*

*Pless, supra,* supports appellant's argument. In *McDonald v. Pless* and *Mattox. v. United States* (a capital murder case), *both supra,* the Supreme Court was dealing with the common law rule "that a juror cannot impeach his own verdict," 238 U.S. at 267, 35 S.Ct. at 784, and they decided that an exception should be made where external influences on the jury were involved. Of course, that exception was later adopted in Fed.R.Evid. 606(b) and Mil.R.Evid. 606(b). We have found no authority for a capital-case exception to the general prohibition against jurors impeaching their sentence. In fact, the weight of authority is to the contrary. *Dobbs v. Zant*, 963 F.2d 1403, 1411 (11th Cir.1991) (refused to consider juror's testimony that jury arbitrarily imposed death sentence because they did not believe it would be executed), *rev'd on other grounds*, __ U.S.__, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993); *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir.1990) (refused to consider juror's testimony that jury did not believe a death sentence would be executed), *cert. denied*, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991); *Dobbs v. Zant*, 720 F.Supp. at 1468 (refused to consider juror's deposition that she voted for death sentence because of prior convictions which judge had instructed jurors not to consider), *rev'd on other grounds*, __ U.S. __, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993). *See also Songer v. State*, 463 So.2d 229, 231 (Fla.1985) (refused to consider juror's testimony that she erroneously thought she could not consider nonstatutory mitigating factors).

One federal Court of Appeals appeared to recognize a "due process" exception to Fed.R.Evid. 606 in *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir.1987):

> The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, further review may be necessary in the occasional case to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent.



In fact, however, *Shillcutt* actually involved an external influence on the jury, *i.e.*, racial prejudice, and thus may not involve an exception to Fed.R.Evid. 606. *See Tobias v. Smith*, 468 F.Supp. 1287, 1291 (WDNY 1979) (racial prejudice is external influence).

17. Likewise, there is some authority for a "clerical error" exception, which may or may not fall under the "due process" umbrella, in which affidavits of a juror were received to show that the verdict announced was not the verdict "actually agreed upon." *United States v. Dotson*, 817 F.2d 1127, 1130 (5th Cir.1987), *revised in part on other grounds*, 821 F.2d 1034 (5th Cir.1987). There is no allegation of clerical error in appellant's case. Even if the affidavits are construed in the light most favorable to appellant, they fall short of suggesting that the multiple findings regarding aggravating circumstances, the balancing of aggravating circumstances against extenuating and mitigating circumstances, and the announced sentence are not what was actually agreed upon. At most, the affidavits of Colonel Aylor could be construed to suggest that the court members did not "revote" on the aggravating factors after their earlier unanimous findings. Accordingly, the clerical error exception does not apply to this case.

18. The only remaining question is whether this Court should carve out an exception for military capital cases. We decline to do so. We believe that invading the court-martial deliberations on the basis of the three affidavits proffered by appellant would be contrary to the intent of Congress in adopting Fed.R.Evid. 606(b), contrary to the intent of the President in promulgating Mil.R.Evid. 606(b), and contrary to the decision of the Supreme Court in *Tanner v. United States, supra,* and the overwhelming weight of authority among the federal courts which have considered the issue. Accordingly, we will not consider the affidavits or order further inquiry into the matters addressed by them. Moreover, in the absence of any competent evidence to the con-

trary, we hold that the court members followed the military judge's correct instructions on voting procedures to be followed during the sentencing deliberations.

**ISSUE II**

**WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A RELIABLE MENTAL HEALTH EVALUATION WHICH IN TURN DEPRIVED APPELLANT OF THE EFFECTIVE ASSISTANCE OF TRIAL DEFENSE COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, 10 USC § 855.**

19. Appellant did not attack the qualifications of his sanity board at trial or before the Court of Military Review. He attacked his counsel before the Court of Military Review, contending that they were ineffective for not raising the issue of his mental responsibility. 34 MJ at 1067-68. Having lost before the Court of Military Review on the ineffectiveness-of-counsel issue, appellant now maintains that he was deprived of the effective assistance of counsel because his counsel relied on a defective sanity board.

On January 6, 1989, prior to his court-martial, appellant requested psychiatric assistance in accordance with *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) and *United States v. Toledo*, 25 MJ 270 (CMA 1987), *cert. denied*, 488 U.S. 889, 109 S.Ct. 220, 102 L.Ed.2d 211 (1988). On January 9, a sanity board was ordered in accordance with RCM 706 (Change 3). The sanity board was composed of two psychiatrists, Major David Orman, M.D. and Captain Richard Moczygemba, M.D.; and a clinical psychologist, Captain Lang Coleman. The board concluded that appellant had an antisocial personality disorder and a borderline personality disorder but no severe mental disease or defect.



The sanity board submitted its report February 6, 1989. On February 9, defense counsel repeated concern expressed earlier that appellant had an organic brain dysfunction. Captain Moczygemba, a member of the sanity board, agreed that appellant should be tested further and referred him to Dr. Pamelia F Clement, Ph.D., a clinical psychologist, for neuropsychological evaluation. Dr. Clement found no evidence of mental impairment.

CPT Moczygemba also requested radiologic testing to exclude possible organic brain defects. A CT scan was conducted on appellant, which showed no abnormalities. The sanity board issued an addendum on February 17 reflecting the additional testing. Def. App. Ex. C.

20. Defense counsel also requested funding to hire a defense psychiatric expert and later named the one they wanted. The request for funding was denied on January 27, 1989, but the Government offered a military psychiatrist as a substitute. After rejecting two military psychiatrists, the defense accepted COL David Armitage, a forensic psychiatrist, who holds professional degrees in both medicine and law. COL Armitage is Associate Chairman for Foresenic Science and Litigation Support, Department of Legal Medicine, Armed Forces Institute of Pathology, Washington, D.C., and Consultant Emeritus to the Surgeon General of the Army on Forensic Psychiatry. COL Armitage worked as a member of the defense team, was present at most of appellant's court-martial, and participated in *voir dire* of the court members.

After appellant was convicted and sentenced, appellate defense counsel obtained evidence that Captain Coleman, who had been identified in the sanity board report (¶ 3) as "Ph.D. clinical psychologist," did not receive his Ph.D. until May 1989 and was not licensed by the State of Wisconsin until September 1989. In response to the defense evidence, government appellate coun-

sel produced evidence that Captain Coleman completed all his educational requirement for his Ph.D. in the fall of 1988, even though he did not receive his degree until May of 1989 and that Captain Coleman was credentialed by the Army to serve as a clinical psychologist.

After trial, appellate defense counsel obtained several affidavits attacking the validity of the psychological and neuropsychological tests performed by Captain Coleman and Dr. Clement. An affidavit from Dr. Niles, Director of the Trauma Recovery and Counseling Center, Alexandria, Virginia, asserts that Captain Coleman erred by not conducting follow-up psychological tests for Post-Traumatic Stress Disorder. Dr. Niles further asserts that there are clear indicators that appellant suffers from post-traumatic stress disorder. Affidavits from Dr. H. Anthony Semone (psychologist) and Dr. James Merikangas (psychiatrist) assert that the neuropsychological testing conducted by Dr. Clement was performed improperly and thus is invalid.

21. The first question is whether appellant's constitutional right to have access to a competent psychiatrist has been infringed. In *Ake v. Oklahoma*, 470 U.S. at 83, 105 S.Ct. at 1096, the Supreme Court set out the standard:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a signifiucant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the . . . defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. . . .

We hold that the *Ake* standard has been met in appellant's case. Appellant was given access to several competent psychia-



trists. Major Orman and Captain Moczygemba, whose credentials have not been attacked, evaluated appellant during his initial sanity board. Colonel Armitage, whose competence has not been attacked, participated throughout the trial as a member of the defense team.

The next question is whether the requirements of RCM 706 (Change 3) have been met. RCM 706(c)(1) provides that an inquiry into mental capacity or mental responsibility "shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist."

22. We hold that the requirements of RCM 706(c)(1) have been met in appellant's case. A board consisting of a single psychistrist would have satisfied the rule. Furthermore, even assuming *arguendo* that CPT Coleman has not received his Ph.D. degree at the time he participated in the board, there is nothing in the rule requiring that a "clinical psychologist" possess a Ph.D. The record before us reflects that CPT Coleman was a trained psychologist, was credentialed by Army medical authorities as a clinical psychologist, and was assigned to duties as a clinical psychologist. RCM 706 was amended in 1986 to parallel prevailing federal practice of allowing use of clinical psychologists in mental status evaluations. Drafters' Analysis of RCM 706(c)(1), Manual, *supra* at A21-36 (Change 3). Unlike 18 USC § 4247(b), RCM 706(c)(1) does not specify that the psychiatrist or psychologist performing the evaluation be "licensed or certified." Nevertheless, in the absence of evidence to the contrary, the fact that CPT Coleman was credentialed by military medical authorities to perform duties as a clinical psychologist raises a presumption that he was qualified to do so. *See United States v. Masusock*, 1 USCMA 32, 35, 1 CMR 32, 35 (1951) ("presumption of regularity in the conduct of governmental affairs"). That presumption has not been rebutted in this case.

23. Next we must ask whether the post-trial affidavits warrant additional mental examinations pursuant to RCM 706(c)(4). We hold that they do not. While the defense experts attack the methodology of the mental health professionals who evaluated appellant, there is not one iota of evidence that appellant lacked mental responsibility at the time of the offenses or mental capacity at the time of trial.

Finally, we must address appellant's claim that he was deprived of effective assistance of counsel because they relied on a flawed examination into his mental health. While appellant has produced affidavits of experts who assert that the metholodogy was flawed, he has produced nothing to show that the results are incorrect. Disagreements among professionals do not *per se* show incompetence. Appellant has premised his ineffective-counsel argument on an *Ake* violation, which, as noted above, he has not shown. Since we hold that there was no *Ake* violation, we resolve this issue against appellant.

III

WHETHER APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT AT BOTH STAGES OF HIS BIFURCATED TRIAL.

Appellant alleges ten different errors that he asserts rise to the level of ineffective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We will analyze each alleged error separately.

A. *Trial defense counsel failed to conduct an adequate investigation and thus did not discover necessary and relevant information concerning appellant's drug and alcohol use prior to and during the offenses.*

24. Appellant contends that defense counsel failed to utilize the testimony of two potential witnesses. Ms. Gerlinde Joseph



and Ms. Beverly Sedberry. It is unclear from the post-trial affidavits of counsel whether defense counsel knew prior to trial what these potential witnesses would have said if called to testify.

In a post-trial affidavit, Ms. Joseph declared that on the night of December 12, 1988, she noticed appellant "drinking an entire bottle of Jack Daniels, and taking cocaine, hash, marijuana, and amphetamines." She further swore that "[h]e seemed to be taking anything that he could get his hands on. By the time he left, he was extremely intoxicated and high."

In a post-trial statement, Ms. Sedberry stated that on the day of the 7-Eleven robberies, appellant used cocaine. She also declared that on December 12, 1988, she knew "for a fact that he got some cocaine that afternoon. At the very least, Dwight was doing cocaine, marijuana and drinking." Def.App. Ex. R (Vol. IV, Appellate papers).

Appellant contends that defense counsel failed to properly investigate this evidence and failed to raise intoxication as a defense. Government appellate counsel argue that defense counsel's pretrial investigation of the case was reasonable.

25. The Supreme Court has stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." However, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. at 2066.

In this case appellant told his counsel that "he had been drinking" alcohol "and smoking some marijuana prior to the murders," but that his marijuana and alcohol usage had "not intoxicated or affected" him during his crimes. Govt.App. Ex. R at 1. *See Mattheson v. King*, 751 F.2d 1432 (5th Cir.1985) (rejecting a post-trial attack on counsel's performance where appellant did not tell counsel he was intoxicated at the time of the offense),

*cert. dismissed,* 475 U.S. 1138, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986); *Bertolotti v. Dugger,* 883 F.2d 1503 (11th Cir.1989) (counsel not ineffective where he failed to raise voluntary intoxication defense to murder where defendant told police that he lied about his intoxication and where evidence of intoxication was not sufficient), *cert. denied,* 497 U.S. 1031, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990).

In post-trial affidavits, defense counsel have stated that they chose not to present evidence of voluntary intoxication for strategic reasons. Defense counsel discussed the possibility of an intoxication defense with a medical expert who advised against raising such a defense. The defense team was aware of psychological literature stating that criminals use "alcohol and drugs to 'get up their nerve' to commit crimes" and were concerned that appellant's use of drugs would be viewed as an aggravating factor rather than a mitigating factor. Govt.App. Ex. 2 at 7. *See Rogers v. Zant,* 13 F.3d 384 (11th Cir.) (decision not to investigate possible defense based on drug use was reasonable where counsel knew that local jury would likely react hostilely to such a defense), *cert. denied,* __ U.S. __, 115 S.Ct. 255, 130 L.Ed.2d 175 (1994); *Wilkins v. Iowa,* 957 F.2d 537, 541 (8th Cir.1992) (failure to present evidence of voluntary intoxication a "reasonable professional judgment[ ]" because jury might be unsympathetic to "self-induced intoxication").

Furthermore, defense counsel believed that a voluntary intoxication defense could be impeached by appellant's detailed confession and the detailed statements to the psychiatrist at the sanity board. These detailed recollections were not likely to come from a mind significantly diminished in capacity by drugs and alcohol, thus they would have made the defense appear contrived.

We hold that appellant has not satisfied the first prong of *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. at 2064, by showing that his counsel's performance was deficient. Al-



though defense were aware of some evidence of voluntary intoxication, they chose not to pursue that defense. They have offered sound reasons for their decision, and we will not second-guess counsel after-the-fact. *Id.* at 689, 104 S.Ct. at 2065. *See id.* at 690-91, 104 S.Ct. at 2066 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

B. *Trial defense counsel failed to move to suppress appellant's confessions on the basis they were improperly coerced and involuntary.*

26. Appellant does not claim that he was interrogated without being advised of his rights, but rather that his confession was coerced. Mil.R.Evid. 304 states that, notwithstanding valid police warnings given pursuant to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Article 31, UCMJ, 10 USC § 831(b), involuntary statements made by an accused are *per se* inadmissible to prove guilt. Voluntariness is to de determined through a totality-of-the-circumstances test. *Blackburn v. Alabama,* 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960).

Appellant asserts four reasons why his confession was involuntary: (1) he was denied the opportunity to talk with an attorney; (2) CID threatened to deport appellant's girlfriend; (3) appellant was intoxicated; and (4) investigators consistently promised appellant that he could see his girlfriend. Appellant argues that his counsel was aware of these indicators of involuntariness but failed to move to suppress appellant's confessions.

Appellant's first reason is unsupported by the record. The record reflects that appellant was advised of his rights by SA Schnayerson, that he waived his rights to a lawyer in writing, that his confession was videotaped, and that appellant slept for 8

hours while the tapes were transcribed into a written statement. On the following morning appellant acknowledged in writing that he had again been advised of his right to a lawyer. He took about an hour to review the 14-page, single-spaced transcript of his interview, initialed each page, and then signed and swore to his statement. Other than his bare post-trial assertion, appellant has offered no evidence to contradict the evidence of record. On the basis of the record before us, we cannot fault counsel for failing to object to the confession based on a denial of counsel.

27. The second reason is likewise unsupported by the record. Appellant claims that this allegation is corroborated by the fact that his girlfriend was located in an adjoining room during part of appellant's confession where the police would have ready access to her passport. In fact, the record reflects that Ms. Pessina was at her home in Killeen while it was being searched at the same time appellant was being questioned at Fort Hood by the CID. Unfortunately for appellant, the record is devoid of any evidence that Ms. Pessina was threatened with deportation, that any such threats were communicated to appellant, or that appellant complained to his counsel or anyone else of any threats to deport his girlfriend. Indeed, in an affidavit, the lead defense counsel specifically denied that appellant told him about any mention of deportation or of appellant's being shown her passport during the interrogation. (Def.App. Ex. S at 3d page.) Appellant, however, asserts the contrary. (Def. App. Ex. T.)

Appellant also asserts that his confession was involuntary because he was intoxicated at the time of the confession. This assertion is also unsupported by the record. On the evening of appellant's arrest, he had been at work for 8 hours. Appellant gave a detailed and coherent confession, which was videotaped. After sleeping for 8 hours, appellant reviewed the transcript of his interview, signed it, and swore to it. We cannot fault counsel for failure to raise this baseless objection. *See Boggs v. Bair*, 892 F.2d 1193, 1199 (4th Cir.1989) (defendant's "confession was



not made inadmissible by any degree of intoxication he may have suffered the night in question," where the record supported findings that he was not "so intoxicated that his will was overborne"), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2193, 109 L.Ed.2d 521 (1990).

Finally appellant asserts that his confession was coerced through promises that he could see his girlfriend, Nadia. Once again, the record does not support his assertion. The only evidence of record pertaining to this alleged coercion is SA Schnayerson's testimony that appellant asked to talk to Nadia and SA Schnayerson responded that it would be "no problem." Because the Killeen Police also were conducting interviews, appellant and Nadia "just never got together." *See Miller v. Fenton*, 741 F.2d 1456, 1467 (3d Cir.1984) ("promises by interrogators will not invalidate confession unless they are sufficient to overbear defendant's will"), *rev'd on other grounds*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). We cannot fault counsel for failure to raise this unsupportable objection.

We hold that appellant's confession was properly received in evidence and that failure of defense counsel to seek suppression of appellant's confessions did not make their representation deficient.

C. *Trial defense counsel failed to move to suppress evidence which was unlawfully seized from Ms. Pessina's apartment.*

28. Appellant's girlfriend, Ms. Pessina, was approached by police investigators on the afternoon of December 13, 1988, and asked to come to the Killeen police station for questioning. She provided a written statement and signed a written consent to a search of her residence. The search yielded appellant's pistol, spent and unspent bullets, and a blood-stained man's jacket.

Ms. Pessina returned to the police station just before midnight on December 13-14 for further questioning, at which time

she made a second statement and again consented to a search of her residence, which resulted in seizure of a black ski mask, a pair of gloves, and a green BIC lighter.

Appellant argues that defense counsel's performance was ineffective in that he failed to move to suppress the evidence obtained during the two searches on the grounds that Ms. Pessina's consent was not voluntary. Since the written consent forms were not introduced in evidence, *see* Appendix I to Answer to Final Brief; and Pros. Ex. 104 for ID, we will not consider them to uphold the search but will consider them for the limited purpose of determining whether counsel were ineffective for failing to contest their efficacy. In each form, Ms. Pessina acknowledges that she was advised of her "constitutional right" to have a search of her property made only with a warrant and of her "right to refuse to consent to such a search." App. I, *supra*.

Ms. Pessina's testimony at trial suggests that she may not have understood that she had a right to refuse. What is clear is that she understood that her residence would be searched whether she consented or not.

Appellant bases his argument on primarily two factors: Ms. Pessina was unfamiliar with search and seizure procedures; and investigators coerced Ms. Pessina by telling her that if she did not consent, they could obtain a warrant anyway.

29. Where a claim of ineffective assistance of counsel is based on "defense counsel's failure to litigate a Fourth Amendment" objection to evidence, appellant "must . . . prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence. . . ." *Kimmelman v. Morrison*, 477 U.S. 365, 365, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986).

Assuming *arguendo* that appellant would have had standing to object to a search of Ms. Pessina's home, which is questionable, we hold that appellant has failed to demonstrate that a Fourth Amendment objection to the evidence would have been meritorious. While defense counsel could have challenged the validity of Ms. Pessina's consent, a motion to suppress would not have been meritorious for two reasons. First, an otherwise valid consent is not vitiated by a threat to obtain a warrant if the threat is well-founded. *United States v. Duran*, 957 F.2d 499, 502 (7th Cir.1992). Second, a search of Ms. Pessina's residence was inevitable.



The investigators' threat to obtain a search warrant was firmly grounded in that they had probable cause to search the residence. At the time of the first search, the investigators knew that appellant and Ms. Pessina fit the general description given by Mr. Harrison, the surviving cab driver. Mr. Harrison's destination when he was robbed and almost murdered was Ms. Pessina's residence. She had told police that she and appellant had taken a cab to her residence, that she exited at her residence while appellant purportedly continued in the cab to buy cigarettes, and that appellant returned to her residence after a short time and spent the night. Mr. Harrison remembered taking appellant and Ms. Pessina to the vicinity of 909 Mimosa Street and told police and his dispatcher that he observed his assailant going back toward Mimosa Street with the pistol and the fruits of his robbery. Under the circumstances, we hold that there was probable cause to search the premises at 909 Mimosa Street, making any police threat to obtain a warrant well-founded.

30. By the time of the second search, police also had found a cab driver's coin changer in appellant's field jacket, appellant had confessed, and in his confession he said that he left a green lighter taken from one of his victims in Nadia's residence.

Apart from the validity of Ms. Pessina's consent, it is clear that the items seized during the two searches were admissible because a search of her residence was inevitable. Mil.R.Evid. 311(b)(2); *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *United States v. Kozak*, 12 MJ 389 (CMA 1982). While the search of Ms. Pessina's residence was ongo-

ing, appellant was confessing. In his confession, he told investigators that he had hidden the murder weapon and some of the fruits of the crime in Ms. Pessina's residence. We have no doubt that the fast-moving investigation of appellant's crimes would have included a search of Ms. Pessina's residence.

Appellant is not entitled to "a windfall" based on erroneous exclusion of evidence. *See Lockhart v. Fretwell*, __ U.S. __, __, 113 S.Ct. 838, 843, 122 L.Ed.2d 180 (1993). In this case the evidence was clearly admissible, and appellant's counsel were not ineffective for failing to object to its admission.

D. *Trial defense counsel failed to object to improper evidence of uncharged misconduct during findings.*

31. During the Government's case-in-chief, one of the court members asked Ms. Ira Printers, Ms. Pessina's roommate, if appellant had ever been physically violent towards Ms. Pessina. Without objection from defense counsel, Ms. Printers responded that she did not know about it beforehand, but found out during Ms. Pessina's statements to police that appellant had assaulted Ms. Pessina previously.

Defense counsel then submitted Ms. Pessina's sworn statements to police as defense exhibits without requesting that the references to physical violence be redacted. Furthermore, defense counsel did not object to admission of Ms. Pessina's hospital records concerning injuries allegedly caused by appellant. The same court member who questioned Ms. Printers about the physical violence asked about the hospital records which were then admitted as a defense exhibit without defense objection. Finally, defense counsel did not object to Ms. Pessina's testimony concerning the alleged assaults.

Appellant argues that the evidence of uncharged misconduct violated Mil.R.Evid. 404(b) and 403. The Government argues that the uncharged misconduct was admissible as rebuttal evidence under RCM 913(c)(1)(C).



32. This Court has set out a basic test for determining admissibility of evidence of uncharged misconduct. "The threshold question . . . 'is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime. . . .'" *United States v. Rodriguez*, 31 MJ 150, 155 (CMA 1990). If this threshold is crossed, the uncharged misconduct must meet a three-part test. First, the extrinsic evidence is not admissible unless it reasonably tends to prove that the accused committed the uncharged crimes, wrongs, or acts. *Id.* at 155. Second, the evidence must make some "fact that is of consequence to . . . the action more probable or less probable." *United States v. Ferguson*, 28 MJ 104, 108 (CMA 1989). Finally, the "probative value" of the evidence must not be substantially outweighed by "the danger of unfair prejudice" or confusion. *United States v. Reynolds*, 29 MJ 105, 109 (CMA 1989).

Appellant pays little attention to the threshold question and the first part of the test. Instead, appellant argues that the prior assaults on Ms. Pessina do not relate to a material issue in the case. *See United States v. Munoz*, 32 MJ 359, 364 (CMA) (Extrinsic evidence must relate to a "material issue" in the case.), *cert. denied*, __ U.S. __, 112 S.Ct. 437, 116 L.Ed.2d 456 (1991). Specifically, appellant argues that the assaults did not have anything to do with the murders, attempted murders, and robberies of unrelated persons. Furthermore, appellant argues that any probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

We hold that defense counsel were not deficient for failing to object to the evidence of uncharged misconduct, because such an objection would not have been meritorious. The overall defense approach was to portray Ms. Pessina as a manipulator who was deeply involved in appellant's crimes. Evidence depicting appellant as a person who abuses his girlfriend directly contradicted the defense's theory that appellant was under her domina-

tion. Furthermore, the probative value of such evidence does not appear to be substantially outweighed by danger of unfair prejudice.

E. *Trial defense counsel failed to present the defense of voluntary intoxication or to introduce any evidence, either on the merits or at sentencing, regarding appellant's mental condition at the time of the offenses.*

33. We hold that defense counsel was not deficient for failing to present evidence of voluntary intoxication, for the reasons stated with respect to sub-issue A, *supra* at 241. We hold that defense counsel was not deficient for failing to introduce evidence regarding appellant's mental condition for the reasons stated with respect to Issue II, *supra* 239.

F. *Trial defense counsel failed to object to improper aggravation evidence and improper instructions allowing the panel to consider "lack of rehabilitative potential" during the sentencing proceedings.*

34. During the sentencing hearing, the prosecution introduced evidence of appellant's unsatisfactory performance as a soldier, including three records of nonjudicial punishment under Article 15, UCMJ, 10 USC § 815, and one record of proceedings in which a suspension of nonjudicial punishment was vacated. The records show the following nonjudicial actions: (1) punishment imposed on May 19, 1987 for a 1-day unauthorized absence; (2) punishment imposed on July 31, 1987, for wrongful use of marijuana; (3) punishment imposed on October 4, 1988, for missing formation on three occasions and willfully disobeying a noncommissioned officer's order to lay out equipment for an inspection; and (4) an action dated October 28, 1988, vacating the suspension of the forfeiture imposed on October 4, because appellant broke restriction.



35. The prosecution also called Captain (CPT) Bush, appellant's battery commander, who testified about appellant's duty performance and disciplinary problems. CPT Bush testified that when he assumed command, approximately 1 year prior to appellant's court-martial, the outgoing commander and he discussed all the soldiers in the battery. The outgoing commander told CPT Bush that appellant "had been in trouble before and that he was somebody you might want to keep an eye on, but he seemed to be doing good at the time." During the early days of CPT Bush's command, appellant's "duty performance was pretty good, motivated, worked hard for his section chief. He stayed out of trouble, basically." In January of 1988, the unit recommended appellant for a medal because of his performance at the National Training Center. After a short while, "[h]e got involved with a—a woman downtown and he just started showing up late for formations and missing formations and problems like that." After counseling and other corrective actions failed, appellant received nonjudicial punishment from the battalion commander, and part of the punishment was suspended. CPT Bush testified that he believed "if we suspended [sic] him for the maximum amount of time it might break up the relationship with the woman he was hanging around with and that might help solve his problems." Within 10 days, the suspension was vacated because of further misconduct. At that point, CPT Bush decided to recommand that appellant be administratively discharged from the Army. When trial counsel asked, "How much rehabilitation potential did he have as a soldier?," CPT Bush responded, "At that point he had—in my opinion, he had none. There was nothing we could do for him."

On cross-examination, defense counsel further explored the effects of appellant's relationship with Ms. Pessina on his duty performance. CPT Bush testified that appellant responded to the leadership of Sergeant (SGT) Key and himself and "[h]e was doing well for a while." Appellant earned back the rank he had

lost. In the words of defense counsel, "And then Nadia came into the picture," after which appellant's performance deteriorated.

36. The military judge later instructed the members, without defense objection, that they could consider the evidence of appellant's nonjudicial punishment and CPT Bush's testimony as aggravating circumstances. The military judge also instructed the members that the military recognizes five principal reasons for sentencing those who violate the law: 1) "protection of the society from the wrongdoer"; 2) "punishment of the wrongdoer"; 3) "rehabilitation of the wrongdoer"; 4) "preservation of good order and discipline"; and 5) "deterrence of the wrongdoer and those who know of his crime and his sentence." Defense counsel objected only to the deterrence portion of the instruction.

Appellant now asserts that the failure of trial defense counsel to object to CPT Bush's testimony and the military judge's sentencing instruction constituted ineffective assistance of counsel. Appellant argues that CPT Bush's testimony concerning appellant's rehabilitative potential should not have been considered as an aggravating circumstance and that his defense counsel was deficient in not objecting to it.

Furthermore, appellant asserts that the judge erred in instructing the members to consider all five reasons for sentencing in the military since only two (punishment and deterrence of others) have been recognized to be appropriate in capital cases, and his defense counsel was deficient for failing to object to the instructions. *See Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

37. Appellant buttresses his argument that rehabilitation evidence is not admissible in a capital murder case by citing *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). In a separate opinion, Justices Stevens, Brennan, and Marshall stated:



> In general, punishment may rationally be imposed for four reasons: (1) to rehabilitate the offender; (2) to incapacitate him from committing offenses in the future; (3) to deter others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution. *The first of these purposes is obviously inapplicable to the death sentence.* The second would be served by execution, but in view of the availability of imprisonment as an alternative means of preventing the defendant from violating the law in the future, the death sentence would clearly be an excessive response to this concern. We are thus left with deterrence and retribution as the justification for capital punishment.

*Id.* at 477-78, 104 S.Ct. at 3171-72 (emphasis added). *See also Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring) (The death penalty "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice."); *Beam v. Pasket*, 966 F.2d 1563, 1572 (9th Cir.1992) (A death sentence cannot be obtained unless the sentence is in furtherance of "its interest in retribution, in deterrence, or in the elimination of those likely to kill again."), *vacated*, __ U.S. __, 113 S.Ct. 1837, 123 L.Ed.2d 464 (1993), *rev'd on other grounds*, 3 F.3d 1301 (9th Cir.1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1631, 128 L.Ed.2d 354 (1994).

The Government, however, points to RCM 1001(b)(5), which states that the prosecution may present "evidence, in the form of opinion, concerning the accused's previous performance as a servicemember and potential for rehabilitation." *See United States v. Stinson*, 34 MJ 233 (CMA 1992) (In a sentencing hearing, an accused's potential for rehabilitation is a proper subject of testimony by qualified experts.).

38. We agree with the Government that appellant's nonjudicial punishment and CPT Bush's opinion about his duty

performance were admissible under RCM 1001(b)(2) and (5). *Cf. Barclay v. Florida*, 463 U.S. 939, 956, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983) (evidence admissible to show that mitigating circumstance did not exist). CPT Bush's testimony arguably violated our prohibition against euphemisms for a punitive discharge in *United States v. Ohrt*, 28 MJ 301 (CMA 1989), but we do not find defense counsel's performance deficient for failing to object to it. Defense counsel had already presented the testimony of SGT Key, appellant's first-line supervisor on the merits. SGT Key had testified that appellant was "having problems" when SGT Key first arrived, but that he later responded to leadership and "was squared away for 12 good months." SGT Key testified further that "[w]hen he met Nadia, it went out the window." It is clear from the cross-examination of CPT Bush that trial counsel played into defense counsel's hands by reinforcing the defense proposition that appellant was obsessed with Ms. Pessina. Rather than object to the testimony, defense counsel used it to advantage by cross-examining CPT Bush to establish that appellant was developing into a good, responsible soldier until he fell under the spell of Nadia Pessina. In our view, this defense strategy was sound.

39. We turn next to the question whether the military judge erred by characterizing appellant's lack of rehabilitative potential as an aggravating circumstance. RCM 1004 creates two categories of aggravating evidence: a broad category of aggravating "circumstances" and a narrower category of aggravating "factors." RCM 1004(b)(4) (Change 2) provides:

> Death may not be adjudged unless:
>
> (A) The members find that at least one of the aggravating factors under subsection (c) existed;
>
> (B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and



> (C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under RCM 1001(b)(4), including the factors under subsection (c) of this rule.

RCM 1004 combines the two procedures generally employed by the states in capital cases. The states generally fall into two categories: "weighing" and "nonweighing." A "weighing" state balances extenuating and mitigating circumstances against statutory aggravating factors. A "nonweighing" state requires that a statutory aggravating factor be found in order to adjudge a death sentence, but does not require that it be weighed against extenuating and mitigating circumstances. RCM 1004 combines both processes, by first requiring that an aggravating factor be found, and then requiring that extenuating and mitigating circumstances be weighed against aggravating circumstances, which include the aggravating factors.

This Court has specifically opined that lack of rehabilitative potential is *not* an aggravating circumstance. *United States v. Aurich*, 31 MJ 95, 96-97 n. *See* RCM 1001(b)(4) and (5). Accordingly, we hold that the military judge's characterization of appellant's disciplinary record and CPT Bush's testimony as aggravating circumstances, as that term is used in RCM 1001(b)(5), was error.

40. Where, as in this case, the sentencing authority in a "weighing" jurisdiction has considered an invalid aggravating circumstance, an appellate court may either reweigh the circumstances or conduct a harmless-error analysis. *Stringer v. Black*, 503 U.S. 222, __, 112 S.Ct. 1130, 1136, 117 L.Ed.2d 367 (1992); *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

We hold that appellant was not prejudiced by the military judge's characterization of appellant's duty performance as an aggravating circumstance or by his counsel's failure to object to

that characterization, because the error was harmless. The Supreme Court has recently held that when ineffective assistance is alleged, "a criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Lockhart v. Fretwell*, __ U.S. at __, 113 S.Ct. at 842, *citing Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. at 374, 106 S.Ct. at 2582.

In the case before us, CPT Bush's evaluation of appellant's potential for military service pales in the context of the overwhelming evidence of a series of brutal murders and robberies. We are satisfied that the military judge's characterization of appellant's disciplinary record and CPT Bush's testimony as an aggravating circumstance did not prejudice appellant, especially in light of the defense strategy of attributing appellant's decline in performance to Ms. Pessina's domination. *See Zant v. Stephens*, 462 U.S. 862, 889, 103 S.Ct. 2733, 2749, 77 L.Ed.2d 235 (1983) (mislabeling aggravating evidence had " 'an inconsequential impact on the jury's decision regarding the death penalty' "). Furthermore, our review of the evidence presented and the arguments of counsel satisfy us that the decision to impose the death sentence was based on the facts and circumstances of the case rather than a numerical weighing of aggravating factors and circumstances against mitigating circumstances.

G. *Trial defense counsel failed to adequately investigate and ensure the accuracy and reliability of the pretrial sanity board and neuropsychological evidence before relying on the evidence.*

Based on defense counsel's exhaustive inquiry into appellant's mental condition, as outlined in our discussion of Issue II, *supra*



at 239, above, we hold that defense counsel fully complied with the requirement to "make reasonable investigations." *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. at 2066.

H. *Trial defense counsel failed to request funds for a mitigation specialist or to present a cohesive, comprehensible background, social, medical, and environmental history for appellant.*

41. Appellant argues two points on this sub-issue; trial defense counsel failed to request funds for a mitigation specialist, and counsel failed to present all of the mitigation evidence available, including the testimony of Dr. Armitage.

Trial defense counsel did not utilize a mitigation expert. Instead, defense counsel conducted his own investigation and presented his evidence through lay witnesses, and then used his sentencing argument to link the evidence to an appropriate sentence. Through the testimony of appellant's father, mother, brother, and sister, and the affidavit of another brother, defense counsel established that appellant was the youngest of eight children. They produced evidence that appellant's father drank heavily, had a long police record, was physically abusive, did not know appellant's age or birthday, and left all responsibility for child rearing with appellant's mother. They established that appellant's mother worked nights to support the family until she could no longer work because of illness. Finally, using the testimony of family members as well as the testimony of a police officer from appellant's home town, they established that appellant grew up in an economically depressed, violent, drug-infested neighborhood with substandard schools.

Through the stipulated testimony of a teacher and appellant's school records, defense counsel established that appellant was academically substandard in high school and a frequent truant and disciplinary problem. Appellant was "moody and temperamental in the classroom" and "would easily flare up." Appellant's parents showed no interest in "his progress or problems."

Mr. Lord Johnson, a boxing coach, testified that appellant entered his program when he was 7 or 8 years old. Appellant trained hard and did well. They had a "beautiful relationship" until appellant left the program when he was 15 years old. Mr. Johnson opined that appellant could be "manipulated or controlled." Finally, Mr. Johnson testified that in his opinion appellant would not be a dangerous person if confined.

42. Finally, defense counsel called two noncommissioned officers from the Fort Hood Detention Facility, who testified that appellant presented no disciplinary problems while in pretrial confinement, that he was a good worker, and that he "adjusted well to confinement."

CPT Bush, during his testimony, established that appellant responded well to the leadership of SGT Key and was performing well until he became involved with Ms. Pessina.

The thrust of the defense case on sentencing was to convince the court-martial to confine appellant rather than execute him. The defense presented evidence to show that, if appellant were isolated from external influences and placed in a structured environment, he would not be dangerous and that, therefore, the needs of justice and society made his execution unnecessary.

In argument, defense counsel pointed out that appellant was the product of parental neglect and violent surroundings. Defense counsel portrayed appellant as a person of limited intelligence and arrested emotional development, who was a follower, manipulated and controlled by Ms. Pessina. Defense counsel emphasized that appellant, in spite of his upbringing, responded well to leadership of Mr. Johnson and SGT Key, adjusted well to confinement, and would not be a threat to society if he were confined.

43. Appellant asserts that mitigation experts are essential for capital murder cases. He argues that a mitigation expert would have been able to present all the appropriate evidence in a more logical and coherent order. He further asserts that the mitigating



factors presented should have been linked through expert testimony with the actions of appellant. Finally, appellant argues that the mitigating evidence presented was disjointed and piecemeal.

Trial defense counsel explains that his failure to present expert mitigation testimony was a tactical choice. Trial defense counsel specifically considered using expert testimony for the purpose of drawing "a nexus between" appellant's "past problems and his present conduct." COL Armitage, a forensic psychiatrist and a member of the defense team, stated in post-trial affidavits that he could have testified and "draw[n] a nexus between" appellant's past and the present and his "tendency to be led," but if he had done so, he also would have had to acknowledge on cross-examination that appellant had a classic "sociopathic personality" and could very easily commit similar crimes in the future. To prevent this damaging result, defense counsel avoided psychiatric testimony.

We hold that counsel's decision not to utilize Colonel Armitage's testimony or that of any other mental health professional was a reasonable tactical choice. *See White v. Singletary*, 972 F.2d 1218, 1225-26 (11th Cir.1992) (trial defense counsel did not provide ineffective assistance of counsel during penalty phase of capital murder prosecution by failing to present mitigation expert testimony on defendant's intoxication because it contradicted trial testimony regarding defense and because jurors generally disdain "drunkenness as an excuse for violent behavior"). The mere fact that defense counsel did not "shop around" for another more favorable expert does not render them ineffective. *See Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992).

We hold further that defense counsel's investigation and presentation of defense mitigation evidence and their decisions regarding use of expert testimony were reasonable. While use of an analysis prepared by an independent mitigation expert is often useful, we decline to hold that such an expert is required

What is required is a reasonable investigation and competent presentation of mitigation evidence. Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses. In this case defense counsel investigated appellant's background and competently presented his evidence during the sentencing phase of the trial. Based on the advice of Colonel Armitage, defense counsel wisely used argument to link the evidence to appellant rather than use an expert who would be vulnerable to devastating cross-examination or rebuttal. This was not ineffective assistance.

I. *Trial defense counsel failed to object to improper government rebuttal evidence.*

44. Appellant contends that trial counsel elicited improper rebuttal evidence from two witnesses, Texas Ranger Aycock and Private Brown. As to Aycock, appellant asserts that it was improper to permit him to testify that, to the best of his knowledge, Ms. Pessina had no criminal activity in her past, that she was "not a suspect here," and that there was no state charges pending against her for concealing knowledge of the felony, making false statement to police, or possession of drugs.

Defense counsel had cross-examined CPT Bush about rumors of Ms. Pessina's drug use and involvement in criminal activity, including murder. This testimony was tendered by the defense to support their theory that Ms. Pessina was the instigator of appellant's crimes.

We hold that Ranger Aycock's testimony was proper rebuttal, and therefore defense counsel were not deficient in failing to object to it. In *United States v. Banks*, 36 MJ 150, 166 (CMA 1992), we explained that "the function of rebuttal evidence is to explain, repel, counteract or disprove the evidence introduced by the opposing party." Of course, proper rebuttal evidence must be restricted to the scope outlined by the evidence of the opposing side. *United States v. Hallum*, 31 MJ 254, 255 (CMA 1990). In this case Ranger Aycock's testimony rebutted the defense



evidence characterizing Ms. Pessina as a known criminal who exercised undue influence over appellant.

45. Appellant also asserts that his counsel failed to object to improper rebuttal testimony by Private Brown. Brown testified that, in private conversation, appellant told him that he "did it the first time to see if he could get away with it, and then he did it because it was fun." Brown testified further that he heard appellant say that if he could do it over again, "the only difference" would be that he would not "get caught." Appellant argues that this evidence was improper because the defense produced no evidence of remorse.

We hold that the evidence was proper rebuttal and that counsel were not deficient for failing to object to it. During cross-examination of SA Schnayerson, who had interrogated appellant regarding the offenses, defense counsel elicited testimony that SA Schnayerson had asked appellant hypothetical questions about the families of the victims, to which appellant responded that he was sorry. During sentencing argument defense counsel specifically mentioned appellant's remorse as a mitigating factor, arguing that "Agent Schnayerson, when he was interviewing Dwight over at the CID building, asked him about feelings for the family or feeling of remorse at that time and asked him if he was sorry, and he did say he was sorry. And that is what prompted the confession, that's when he made the confession and that—that is evidence of remorse." We hold that defense counsel opened the door to the issue of remorse during cross-examination of SA Schnayerson, making Private Brown's testimony proper rebuttal.

J. *Trial defense counsel were ineffective in failing to request a sentencing instruction which would properly inform the panel members that the only offenses which authorized the death sentence were felony murder and premeditated murder.*

46. During instructions on sentencing, the military judge instructed the panel that "a single sentence shall be adjudged for all of the offenses." He then properly instructed the panel that the court-martial was authorized to adjudge a sentence of death or the mandatory minimum sentence of life imprisonment. The military judge failed to instruct the panel, however, that death was an authorized punishment only for the offenses of premeditated murder. Defense counsel neither objected to the sentencing instruction nor requested a specific instruction identifying the offenses for which death was an authorized punishment.

The Government contends that the aggregate effect of the other offenses did not render the death sentence improper because the members' discretion was circumscribed by the three specific aggravating factors concerning which the judge instructed the members. Furthermore, the list of aggravating circumstances presented to the court members by trial counsel and the judge did not include the robbery or attempted murder offenses.

Appellant's argument is founded on this Court's previous cases in which we have held that the court members must be informed of the basis for permissible additional punishment if the additional punishment is permitted based on previous convictions or multiple offenses. *See United States v. Yocum,* 17 USCMA 270, 273, 38 CMR 68, 71 (1967) (must tell members punitive discharge (BCD) authorized because accused convicted of 2 or more offenses for which authorized total confinement is 6 months or more); *United States v. Hutton,* 14 USCMA 366, 370, 34 CMR 146, 150 (1964) (must tell members BCD authorized because accused had two or more previous convictions).

The factual premise for appellant's argument is that the court members did not know which offenses were punishable by death and, therefore, they sentenced him to death for an aggregate of offenses. Neither side's brief mentions the military judge's instructions on *findings,* in which he explained how to announce the vote on the four *capital* offenses. The four capital offenses



were specifically identified on the findings worksheet (App. Ex. CXXIII) and specifically identified by the military judge when he was instructing on the voting procedures for findings. The military judge called specific attention to pages 1, 3, 5, and 6 of the worksheet which identified the four capital offenses and contained specific instructions on how to announce whether the findings were unanimous with respect to those offenses.

47. While it might have been better practice for the military judge to again identify the offenses punishable by death in his sentencing instructions, we are unwilling to presume that the court members did not know that a "capital" offense is punishable by death. We note that defense counsel told the court members on general *voir dire* that "this is a capital murder case" and that "you may have to make a decision whether or not to confine . . . [appellant] in prison for the rest of his life, or to execute him." We hold that the military judge did not err by failing to repeat the portion of his findings instruction which identified which offenses were "capital." We further hold that defense counsel's failure to object or request additional instructinos was not ineffective representation within the meaning of *Strickland.*

K. *Cumulative error.*

Although not specificially asserted by appellant, we deem it appropriate to consider whether defense counsel's conduct of the trial as a whole might have been defective within the meaning of *Strickland,* even though individual oversights or mistakes standing alone might not satisfy *Strickland. See Frey v. Fulcomer,* 974 F.2d 348, 361 n. 12 (3d Cir. 1992) (prejudice determined by review of all of counsel's errors combined), *cert. denied,* __ U.S. __, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993). Our review of the entire record satisfies us that appellant was vigorously and competently defended.

**ISSUE IV**

## WHETHER THE MILITARY JUDGE ABANDONED HIS ROLE AS A NEUTRAL OFFICER OF THE COURT THEREBY DENYING APPELLANT A FAIR TRIAL.

48. Appellant contends that the military judge denied him a fair trial by becoming an advocate for the prosecution. At the intial session of the court-martial under Article 39(a), UCMJ, 10 USC § 839(a), on January 31, 1989, defense counsel conducted an extensive *voir dire* of the military judge and then elected not to challenge him for cause at that time. At an Article 39(a) session on March 16, 1989, defense counsel challenged the military judge for cause based on adverse rulings and comments by the military judge at preceding pretrial sessions.

It is axiomatic that a military "judge may not abandon" his "impartial" role and "assist" the prosecution. *United States v. Reynolds*, 24 MJ 261, 264 (CMA 1987). On the other hand, the military judge "is not a mere figurehead" or "simply an umpire in a contest between the Government and accused." *United States v. Kimble*, 23 USCMA 251, 253, 49 CMR 384 (1974). The military judge has the responsibility "exercise reasonable control over the proceedings." RCM 801(a)(3). He "should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties' presentations or the appearance of partiality." RCM 801(a)(3), Discussion. Because "jurors are ever watchful of the words that fall from him," a military judge must be circumspect in what he says to the parties and in how examines witnesses. *United States v. Clower*, 23 USCMA 15, 18, 48 CMR 307, 310 (1974), *quoting Bollenbach v. United States*, 326 U.S. 607, 612, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946).

RCM 902(a) provides that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's



impartiality might reasonably be questioned." RCM 902 is based on 28 USC § 455 and contains substantially the same language. Drafters' Analysis of RCM 902, Manual, *supra* at A21-45. The standard of appellate review of the recusal decision is abuse of discretion. S. Childress & M. Davis, 2 *Federal Standards of Review* § 12.05 at 12-37 (2d ed. 1992). The standard is based on "the 'reasonable person' test: if a reasonable person would not question the judge's impartiality on the basis of the facts presented, then it is not an abuse of discretion for the judge to deny the motion for recusal." *Id.* at 12-38.

49. Appellant has asked this Court to consider the military judge's "track record" and has cited nine cases in which the military judge has allegedly exhibited pro-government conduct. Final Brief at 155-57. We decline to decide this case on the basis of the military judge's "track record." In the first place, we do not regard nine cases as a representative sample of the record of an experienced trial judge. Second, our obligation is to review the record of trial in this case, not that in other decided cases, to determine if the military judge was partial in this case. *See Liteky v. United States*, __ U.S. __, __, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994) ("[J]udicial rulings alone almost never constitute [a] valid basis for a bias or partiality motion."), *citing United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966).

In support of appellant's assertion that the military judge "has a track record of pro-government conduct," Final Brief at 155, appellate defense counsel assert that the military judge "had reason to celebrate with the prosecution, law enforcement agents, and the murder victim's familiies the very night appellant was sentenced to die." Final Brief at 157-58. This accusation is based on an affidavit from former-Captain Ibbotson, lead defense counsel, in which he asserts, "After the verdict was announced, the prosecutors held a party." Mr. Ibbotson further asserts, "The defense later learned that, in addition to the prosecutors, inves-

tigators and family members, the Military Judge attended as an invited guest." Def.App. Ex. S. Mr. Ibbotson does not disclose the source of his information. The defense has produced no direct or corroborating evidence of this assertion.

The Government countered with an affidavit from Lieutenant Colonel (LTC) (then-Major) Ley, the lead prosecutor and one of the alleged sponsors of the party. LTC Ley asserts unequivocally, "There was no party." Govt.App. Ex. 6, ¶ 2. After comparing Mr. Ibbotson's accusation based on hearsay with LTC Ley's denial based on personal knowledge, we conclude that further inquiry is not warranted.

We turn next to appellant's specific allegations regarding the military judge's conduct of the trial, which we discuss *seriatim*.

A. *The military judge refused to allow appellant access to information showing inaccurate media coverage which bore upon the advisability of changing venue.*

50. At trial appellant requested a change of venue, which the military judge denied. Appellant also requested funding for a "clipping service" and subpoenas to the news directors of all local television stations in order to obtain videotapes of television coverage regarding the charges against appellant. These requests were denied as unnecessary after the military judge received assurances from the Government that the Fort Hood Public Affairs Office would make all news clippings and videotapes of television coverage available to the defense. We hold that the record does not support appellant's allegation that he was refused access to relevant information.

Appellant also asserts that the military judge demonstrated bias by stating that his ruling on the requested change of venue "wouldn't change by my viewing any of these television reports of this trial." The military judge stated that the defense would be permitted to raise the venue issue again if *voir dire* of the court members indicated that they had been influenced by pretrial publicity and that he would liberally grant challenges based on exposure to pretrial publicity.



We note that the military judge's ruling was unsuccessfully challenged before the Court of Military Review. 34 MJ at 964-65. Appellant now asserts that the military judge's treatment of the issue reflects bias against him.

We do not regard the military judge's statement as a demonstration of bias, but rather as a reflection that he correctly understood the law. Pretrial publicity does not necessarily establish that court members have been influenced. The question is whether the members, having been exposed to publicity, can "fairly and honestly try the issues." *United States v. Vigneault,* 3 USCMA 247, 255, 12 CMR 3, 11 (1953). It is only when pretrial publicity creates "so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial" that he is entitled to a change of venue. RCM 906(b)(11), Discussion; *United States v. Gravitt,* 5 USCMA 249, 256-57, 17 CMR 249, 256-67 (1954).

B. *The military judge accused defense counsel of being unethical and manipulating the speedy trial clock.*

51. Appellant's argument is based on an exchange regarding a trial date. After listing what needed to be done, defense counsel argued, "There's an awful lot of things hanging here, and it seems unfair to make the defense go to trial on the 27th and say we're held to any delay." Trial counsel retored, "Your Honor, we're not . . . opposing a defense delay, but I get the feeling that the Government is being maneuvered here into somehow the defense saying, 'I'm not ready to go, we're going to need to evaluate a lot of different things; but somehow, it should all be accountable to the Government.' " The military judge responded:

> Well, that's my perception exactly. Certainly, you fellows aren't trying to maneuver the system, are you? If

you want delay, I'd be more than happy to give you delay. If you want time to check out these things, be my guest; take whatever time you feel is necessary. But in my view so far, the Government has been extremely cooperative with you. If you want more time, as I say, just ask.

To the extent that the military judge perceived that the defense was attempting to gain additional preparation time without foregoing a possible speedy-trial motion, we agree with appellant that defense counsel were "accused" of attempting to use the speedy-trial rules to their advantage. We disagree, however, that the military judge's use of the term "maneuver" amounted to an accusation of unethical conduct.

C. *The military judge suggested to trial defense counsel that he should use an inadequate expert to prepare for trial.*

52. The allegation is unsupported by the record. After the defense requested expert assistance, the Government proffered two medical officers in succession who were unacceptable to the defense. The military judge declined to force the defense to accept them. A third medical officer, Colonel Armitage, was offered by the Government and was acceptable to the defense. The basis of the controversy was not being forced to accept an "inadequate expert"; the basis of the controversy was whether, for speedy-trial purposes, the delay in finding an acceptable expert would be charged to the defense.

D. *The military judge ignored prosecutorial misconduct in excusing a pro-life court member without cause.*

LTC Hardie was detailed to be a court member in appellant's case on February 14, 1989. On February 21, appellant requested enlisted members. On February 23 LTC Hardie completed an extensive "Court-Martial Member Questionnaire" in which he



wrote, "I have morale [sic] reservations regarding capital punishment." On March 23 appellant changed his mind and requested an all-officer court. On March 24, LTC Hardie "faxed" a handwritten request for excusal from court-martial duty to the convening authority, reciting that he had been notified just that morning that he was required to be present for court-martial duty. LTC Hardie, a battalion commander at Fort Sill, listed training commitments scheduled to begin on March 30 which could not be rescheduled because of short notice. Also on March 24, the division staff judge advocate (SJA) submitted a decision paper and a list of nominees to the convening authority. The convening authority relieved the enlisted members and appointed five more officers. LTC Hardie was not reappointed.

53. Appellant's accusation that the military judge ignored prosecutorial misconduct is unsupported by the record. In the first place, there is no evidence of prosecutorial involvement in the selection of court members. All correspondence was between the SJA and the convening authority. Furthermore, there is no evidence that the convening authority was aware of the questionnaire, which apparently was sent out by counsel and returned to counsel in preparation for *voir dire* of court members. Finally, even if the convening authority had been aware of the questionnaire, he would have been justified in not appointing LTC Hardie to sit on appellant's case, because LTC Hardie would not have been "best qualified" within the meaning of Article 25, UCMJ, 10 USC § 825, by virtue of the likelihood of his being challenged for cause based on his moral opposition to the death penalty. *See United States v. Curtis*, 33 MJ 101, 106-07 (CMA 1991) (juror subject to challenge for cause if "religious views or moral scruples" against death sentence would prevent giving "meaningful consideration to impose a death penalty"), *cert. denied*, __ U.S. __, 112 S.Ct. 1177, 117 L.Ed.2d 421 (1992); RCM 503(a)(1), Manual, *supra* at A21-25 (convening authority should avoid detailing members who would be subject to challenge for cause).

E. *The military judge restricted defense counsel's voir dire and chastised him in the presence of a court member.*

Appellant's assertion involves three issues: (1) whether the military judge improperly restricted *voir dire*; and (2) whether the oral exchanges between defense counsel and the military judge reflect that the judge was biased; and (3) whether the military judge prejudiced appellant by scolding defense counsel in the presence of a court member.

1. *Restrictions on voir dire.*

Prior to trial each court member completed and submitted a 7-page "Court-Martial Member Questionnaire," consisting of 35 questions covering personal and family history, civilian and military education, past duty assignments, non-military employment, awards and decorations, volunteer work, previous contacts with the legal system, hobbies, memberships in organizations, and reading habits. These questionnaires were submitted to trial counsel and used by counsel for both sides.

During general *voir dire*, defense counsel asked about familiarity with the evidence, witnesses, and court personnel; court-martial experience; hobbies and reading habits; associations with judges, lawyers, and policemen; attitudes about capital punishment; and general attitudes toward sentencing.

After general *voir dire* was completed, the military judge asked counsel for both sides how much time they needed for individual *voir dire*. Trial counsel anticipated "a few moments," but defense counsel anticipated 45 minutes per member. The military judge then scheduled the members for individual *voir dire* at 30-minutes intervals, closed the court, and moved *voir dire* to a more informal setting in another room.

54. The first court member, LTC Dobbs, was then questioned individually for 57 minutes by both sides, without comment or interruption by opposing counsel or the military judge.



Questioning by trial counsel included civilian education, prior experience as a crime victim, previous military assignments, attitudes toward the criminal justice system in general and capital punishment in particular, as well as his attitude toward conflicts between court-martial duty and other duties.

Defense counsel then questioned LTC Dobbs about his career as a public affairs officer in the Army, other military assignments, family history, participation in sports, volunteer work, attitude toward bumper stickers, reading habits, prior court-martial experience, personal values, capital punishment, and race relations.

After LTC Dobbs was excused, the following exchange took place between the military judge and defense counsel:

> MJ: . . . You guys are going to have to hold down this process (to defense). I'm not going to take an hour for every one of these guys. For example, I'm having great difficulty understanding why you need to know whether a court member has done any volunteer work, put stickers on his car, anything about a divorce, concept [sic] with the enemy in time of war, thoughts on boxing. This process is going to have to be streamlined; because as I say, I'm not going to allow you to have an hour for each one of these guys, with questions like that. Can we get to the core issues? Be my guest and get to those core issues, and do it quickly. So let's jettison some of this stuff that I see as non-essential. Those are just some indications of what I think is non-essential information.
>
> IDC: Sir, in the ones you pointed out there, we have certain reasons why we asked some of those questions. I can—just to give you an example on the stickers. When somebody has a sticker on there that, you know, "my wife, yes; my dog, maybe; my gun, never," or something like that, it tells a little bit about the—

MJ: Ask them about gun control, or something like that. We're not going to go through all of this stuff here. And volunteer work, tell my why you need to know about his volunteer work; clue me in on that one.

[No response from the defense.]

MJ: Well, my point exactly.

DC: No, sir. Well, sir—

MJ: Well, then answer.

DC: Sir, we've consulted with [a] jury consultant on this, as well as our expert, and we feel that this discloses attitudes of the panel, just as the attitudes on divorce, and these other matters. Many of these matters directly have to do with certain mitigating evidence we plan on presenting in this case, as does boxing. It all ties into specific elements and the mitigating evidence we plan on presenting, and their attitudes—or lack of attitude—on these issues is important. We'll drop the part on volunteer work if you insist. We'd just note on the record that we're not able to ask about this. . . .

MJ: Well, I feel that you're wasting time.

DC: Okay, sir.

MJ: Do not waste time. Get to the core issues. Let's move on quickly. Let's not ask these people their entire life history; that's not the design behind voir dire. The design is whether they can sit as an impartial court member.

The individual *voir dire* of the second court member, LTC Griffith, then commenced. Questioning followed the same general pattern and covered the same topics as with LTC Dobbs. Neither opposing counsel nor the military judge interrupted until near the end of the *voir dire*, when defense counsel asked about boxing. The military judge interjected and the following exchange occurred:



MJ: Didn't I tell you, no? I could have sworn I said, don't do that. What is this, open defiance here?

DC: No, sir.

MJ: What are you doing then?

DC: As I've explained to you, some of the key elements in our mitigation case involve—in fact, one of our witnesses, a boxer—

MJ: Answer the question. What are you doing?

DC: I thought that I explained to you about that, sir.

MJ: You can asked [sic] one boxing question, and that's it. That's all the question [sic] you can ask.

Defense counsel then asked LTC Griffith what he thought about boxing, and LTC Griffith gave a lengthy and detailed response.

55. After LTC Griffith was excused, defense counsel asked the military judge to examine their *voir dire* outline and indicate which questions he considered irrelevant or objectionable. Defense counsel then pointed out to the military judge that LTC Griffith had reacted to the military judge's interruption of the questioning about boxing. The military responded:

Call him back and ask him. I'm not going to be defied at this court-martial. When I tell you guys to do something, I expect you to do it. I said no boxing questions. You mentioned boxing would be an issue, or something you would present during extenuation and mitigation. That was what I understood.

The military judge then asked defense counsel to explain why questions about boxing were important. After considerable discussion, defense counsel explained that one of the defense witnesses would be appellant's boxing coach and that the coach's "evaluation of" appellant's "character is inextricably tied to the sport of boxing." Defense counsel then repeated their request that the military judge annotate their *voir dire* outline. The military judge responded:

> Well, I'm not going to waste my time doing that. Ask the questions you want to ask. I'll do this, though. I'll jump in and tell you when to stop, when I think you're just wasting time. I'll allow you to ask a boxing question, then, if you think it's so important to your case. Let's not explore every punch that's ever been thrown by a man here. Let's just ask a nice, brief, brisk question on boxing.

The remainder of *voir dire* was conducted without controversy or interruption, except for one question by trial counsel to which the military judge responded, "An unfair question," and one time when the military judge interrupted a series of defense questions about the importance of schools by interjecting, "Last question in that area. Move on." The next six court members (Major (MAJ) Napoli, MAJ Wilson, CPT Williams, CPT Weiss, Chief Warrant Officer (CW)4 Giebner, and CW3 Hasenauer) were asked substantially the same questions, including questions about boxing, without interruption. Four court members (LTC Thomas, LTC Keating, LTC Aylor, and MAJ Staples) were not asked about boxing.

LTC Keating was challenged for cause and excused. LTC Griffith, the only court member who witnessed any of the exchanges between defense counsel and the military judge, was challenged peremptorily by trial counsel. LTC Thomas and LTC Dobbs were peremptorily challenged by defense counsel.



56. When this Court reviews a military judge's limitations on *voir dire*, we "should reverse only when a clear abuse of discretion, prejudicial to a defendant, is shown." *United States v. Smith*, 27 MJ 25, 28 (CMA 1988), *quoting United States v. Parker*, 6 USCMA 274, 280, 19 CMR 400, 406 (1955). *See* RCM 912(d), Discussion ("The nature and scope of the examination of members is within the discretion of the military judge").

We hold that the military judge did not abuse his discretion in this case. Virtually no topic was off-limits for *voir dire*. Even questions about boxing, the basis of all exchanges between the military judge and counsel, were permitted after defense counsel explained the relevance of the questions.

2. *Bias of the military judge.*

In order to constitute grounds for reversal, a "judge's bias" against a party "must be personal and extrajudicial." *McWhorter v. Birmingham*, 906 F.2d 674, 678 (11th Cir.1990). *See Liteky v. United States*, __ U.S. __, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Generally, courtroom clashes between counsel and the judge do not constitute disqualifying bias. *In re Cooper*, 821 F.2d 833, 838 (1st Cir.1987). *See Liteky v. United States*, __ U.S. at __, 114 S.Ct. at 1157 ("expressions of impatience, dissatisfaction, annoyance, and even anger" not sufficient to disqualify judge). Where bias is alleged to be against an attorney rather than a party, it must be so virulent "that the judge's impartiality toward the client may reasonably be questioned." 821 F.2d at 839; *United States v. Jacobs*, 855 F.2d 652, 656 n. 2 (9th Cir.1988). Applying these principles, we hold that the clashes between defense counsel and the military judge regarding the scope of *voir dire* were not sufficient to disqualify the military judge.

3. *Chastising defense counsel in the presence of a court member.*

57. The record reflects that defense counsel were not chastised in the presence of any court member who sat on appellant's case. All exchanges between the military judge and counsel during *voir dire* were out of the presence of the members, except for one exchange. That was in the presence of LTC Griffith, who was peremptorily challenged by the prosecution, thus mooting any question of prejudice.

F. *The military judge sarcastically criticized defense counsel in the presence of the court members when defense counsel objected to inadmissible hearsay testimony of the medical examiner.*

This assertion is unsupported by the record. The exchange in question did not start with an "objection" by defense counsel, but with the following comment as the pathologist began to read from a report that had not been marked as an exhibit: "Uh-sir, it might be good, just for the record, that she's referring to some notes—I believe it's the autopsy report." The military judge responded, "Don't interrupt, will you please?" The military judge then turned to trial counsel and asked, "[D]o you want to get that into evidence, first, so that the doctor can talk from it?" After laying an incomplete foundation, trial counsel offered several documents in evidence. The military judge commented, "Well, it's slightly premature; but, do you have any objections to it, defense?" Defense counsel responded, "Well, we'd agree with you, sir; but we don't have any objections to it being admitted."

In our view the record does not reflect hostility to the defense, but impatience with both sides as trial counsel was having difficulty with what should have been straightforward testimony of a pathologist on an uncontested issue: the cause and manner of death of Private (PVT) Fay. While the military judge demonstrated impatience with both counsel, his comments fall far short of the "verbal abuse" alleged by appellant. Final Brief at 144-46. *See Litkey v. United States, supra* (impatience not sufficient to disqualify judge).



G. *The military judge allowed a murder victim's wife to testify as to cumulative matters.*

58. During a preliminary session prior to arraignment, the military judge ruled that he would permit non-witness members of the victims' families to sit in the courtroom, but would caution them against any displays of emotion or opinion. During the prosecution case on the merits, trial counsel called Mrs. Sharbino, widow of the victim Bobby Sharbino, to testify. Defense counsel remarked, "Your Honor, we would just note, for the record, our earlier comments—at this juncture." The "earlier comments" referred to defense counsel's concern that family members of the victims might influence the court members by making comments or "doing something physically." The military judge did not respond.

Mrs. Sharbino then testified for the limited purpose of identifying Mr. Sharbino's money bag and wallet. After Mrs. Sharbino was excused, defense counsel asked for and received a side-bar conference, where he stated: "We renew our objections to the testimony of the previous witness—" The military judge responded, "Don't waste my time . . . Your objection's on the record. Her demeanor was neutral: She didn't cry; she didn't raise her voice; she didn't use any hand gestures . . . [A]s a matter of fact, she was rigid, [o]n the stand." Defense counsel then protested, "She had little eye-contact, but she began to lose her voice, and her control." The military judge concluded the sidebar by stating, "She had only eye-contact with the prosecutor, when he was asking questions. Let's drive on here."

Based on this exchange, appellant now argues that the military judge "torpedo[ed]" a defense objection to victim-impact

testimony with an "order to sit down and 'don't waste my time.' " Appellant argues that "[t]he message to the panel was clear, appellant's life was worthless and to put up a defense was an inconvenience to the judge's valuable time." Final Brief at 145.

59. This argument misstates the record on several counts. First, defense counsel did not lodge a specific objection prior to Mrs. Sharbino's testimony. Second, Mrs. Sharbino did not give victim-impact testimony; she merely identified two items of real evidence which had been found in a trash container. Third, counsel were not told to "sit down." Fourth, there was no message sent to the panel members because the exchange occurred in a side-bar conference out of the hearing of the members. The members were unaware that there was any controversy about Mrs. Sharbino's testimony.

We are satisfied that the military judge did not abandon his impartial role by allowing Mrs. Sharbino to testify. Her neutral testimony on an uncontested matter was admissible and did not unfairly prejudice appellant as to findings.

H. *The military judge allowed a surprise government witness to testify without adequate notice or discovery to the defense.*

On December 28, 1988, and January 7, 1989, defense counsel filed discovery requests for, among other things, "[a]ny statements, confessions, or admissions by the accused"; "[t]he name, identity, and current location of any informant"; and "[a] list of the names, addresses, and telephone numbers for all witnesses . . . on the merits or sentencing. . . ." On February 25, 1989, the military judge ordered the Government to disclose the identity of all informants to the defense. On March 24, 1989, trial counsel notified the defense that Private Forrest Brown, an inmate at the U.S. Army Correctional Activity at Fort Riley, Kansas, was a possible prosecution witness. On March 26, defense counsel filed a motion *in limine*, asking that the prosecution be prohibited from introducing the testimony of Private Brown "until the Government complies with all discovery requests submitted by the defense in this case and the defense is given an opportunity to interview and confront this witness against Private Loving."



At an Article 39(a) session on March 27, the military judge asked trial counsel if he was "attempting to provide the information requested by the defense." Upon being told that virtually everything the defense requested was available through Private Brown's former unit and his court-martial record, the military judge then ordered the prosecution to call Private Brown's former unit and to provide the record of trial pertaining to Private Brown's court-martial to the defense.

60. During the sentencing hearing, Private Brown testified for the prosecution, without further objection by the defense. He was asked if appellant said "anything about how he felt about the shootings." Private Brown responded:

> I believe he said--I—we were talking and I believe he said—I asked him why he did something like that—I thought he was joking or he wasn't serious or he was bragging—he said—he did the first—did it the first time to see if he could get away with it, and then he did it because it was fun, and then he said something along the lines, "Because love makes you do crazy things."

Private Brown testified that at a "later time" he heard appellant say "if he had to do it over, the only difference is he wouldn't get caught." On cross examination defense counsel questioned PVT Brown about his court-martial conviction, his pretrial agreement, and other drug offenses for which Brown was investigated but not tried. In a post-trial affidavit, MAJ Hayden, individual defense counsel, states that the defense was "notified" about PVT Brown "the night before [the Government] presented rebuttal testimony." PVT Brown was interviewed by CPT Ibbotson, the

lead defense counsel. MAJ Hayden states, "In hindsight, I would have liked more time to investigate PVT Brown." Def.App. Ex. Y. The defense did not request additional time.

RCM 701(a)(5)(B) requires the prosecution to disclose sentencing witnesses upon defense request. If a party fails to comply with the discovery rules, RCM 701(g)(3) empowers a military judge to "[o]rder the [noncompliant] party to permit discovery"; "[g]rant a continuance"; exclude the evidence; or "[e]nter such other order as is just under the circumstances."

Appellant now argues that the military judge demonstrated an "apathetic attitude over a government surprise witness, Private Brown." He also argues that the military judge "idly ignored defense counsel's motion to exclude his testimony for failure to provide adequate notice." Final Brief at 147.

The record in this case does not reflect noncompliance. Trial counsel disclosed the witness on March 24, 1989. There is no evidence of an attempt to ambush the defense. *See generally United States v. Dancy*, 38 MJ 1, 5 n. 3 (CMA 1993) ("[D]iscovery rules are intended to eliminate . . . "gamesmanship.' "). Since the defense case did not begin until March 30, the defense had time to adjust their strategy. Private Brown did not testify until April 1. Defense counsel interviewed the witness prior to his testimony and did not request additional time or other relief. The record does not support appellant's accusation of an "apathetic attitude" or "idly ignor[ing]" defense counsel's motion. To the contrary, the military judge acted on the motion and directed the Government to comply.

I. *The military judge restricted trial defense counsel's direct examination of Ms. Pessina so that she would not be viewed as an accomplice.*

61. There are two elements to this sub-issue. Appellant contends that (1) Ms. Pessina was an accomplice and should have been treated as such on cross-examination and in the military



judge's instructions; and (2) Ms. Pessina, although called by the defense, was a hostile witness.

**1. Ms. Pessina as an accomplice**

Confronted with overwhelming evidence of guilt, defense counsel wisely focused on avoiding a death sentence. Integral to the defense strategy was an effort to shift the focus from appellant to Ms. Pessina. In his opening statement defense counsel asked the court members to look for "any evidence of Dwight Loving's motivation of what was pushing him toward this crime." Defense counsel urged the members to "[l]ook at the involvement of Nadia in this, and his viewing of that incident; and, see how it all fits together. . . . Look at who needed the money. Look at who had the real agenda for these crimes; who was the idea behind all of this."

62. Appellant asserts that the following evidence supports his argument that Ms. Pessina was an accomplice:

(1) she and appellant were lovers;

(2) she needed money;

(3) she drove the car for the 7-Eleven robberies;

(4) she used money from the robberies to buy cocaine;

(5) before the cab driver murders, appellant told her that he was going to kill someone for money;

(6) appellant told her about the murders and showed her some of the proceeds;

(7) she slept with appellant after he confessed his crimes to her;

(8) the murder weapon and other evidence were found "littered throughout her home";

(9) she lied to the police;

(10) her letters to appellant in prison expressed concern about their being screened by prison authorities;

(11) Mr. Harrison heard her "crinkling" something in the backseat of his cab, which probably was the pistol concealed in

paper bag, and the murder weapon was later found in a crinkled paper bag outside her home;

(12) as they exited Mr. Harrison's cab, she asked appellant, "Have you got everything?";

(13) it was her idea to ride a cab home because her feet hurt;

(14) she saw appellant with the weapon outside the cab and did nothing to stop him;

(15) despite her aching feet, she exited the cab a block from her house and walked home;

(16) she wore the blood-stained jacket which appellant wore in the murders;

(17) she was told by police not to leave the area;

(18) she had no alibi;

(19) she manipulated and controlled appellant; and

(20) she had a motive to avoid involvement because she could be deported if she got into trouble.

Final Brief at 287-89.

At the outset we note that several of appellant's assertions are unsupported by the record. Ms. Pessina was gainfully employed, regularly received money from her father, and denied needing money or asking appellant for money. The testimony of SGT Key, pointed to in appellant's brief in support of his assertion, establishes that appellant was "burning off a lot of money," but makes no references to Ms. Pessina's needs or requests.

63. Appellant's assertion that Ms. Pessina used the proceeds from the robberies to buy cocaine is overstated. She testified that after the 7-Eleven robberies, appellant put some of the money in her jacket pocket, but that she did not use it. The money remained in the jacket pocket until discovered by the police. She testified that she and appellant purchased cocaine on the night after the 7-Eleven robberies. When asked where they obtained the money for the purchase of cocaine, she speculated, "I guess, with the money from the store."



Appellant's assertion that the murder weapon and other evidence were found "littered throughout [Ms. Pessina's] home" is hyperbolic at best. The record reflects that four unspent bullets were found in a dresser drawer along with some clothing; some empty shell casings and one unspent round were found in a trash can in the kitchen; a jacket, ski mask, and gloves were in a closet; and the murder weapon was hidden in a paper bag outside the rear door.

Ms. Pessina's letters to appellant in prison add nothing to appellant's theory. As found by the Court of Military Review, the letters were love letters, nothing more. 34 MJ at 961 n. 6. Ms. Pessina's question whether her letters are inspected reveals nothing more than concern about her intimate letters to appellant being read by prison censors.

Appellant's theory that Ms. Pessina carried the pistol into Mr. Harrison's cab is unsupported by the record. When Mr. Harrison was asked if Ms. Pessina was taking something out of a bag, he prefaced his answer by describing it as "speculation." He then answered that he "heard some *plastic* bag." (Emphasis added.) The murder weapons was found in a paper bag.

64. Appellant's theory that Ms. Pessina manipulated and controlled appellant is likewise unsupported. SGT Key testified that appellant was "overwhelmed with [Ms. Pessina]. He was possessed." On the other hand, she told appellant that he was getting too serious. While it is beyond cavil that appellant was obsessed with Ms. Pessina, there is no evidence that she exploited his obsession to cause the murders and robberies.

With respect to the fact that Ms. Pessina drove the car when appellant robbed the two 7-Eleven stores, the record reflects that appellant did not tell her where he was going. He told her to stop in a place where the first 7-Eleven store was not visible. Both before and after the first robbery she saw him carrying nothing. They then drove to "a street with houses on it" where the 7-Eleven was not in sight. Only after the second 7-Eleven robbery did appellant tell Ms. Pessina what he had done.

With respect to Ms. Pessina's participation in the robbery of Mr. Harrison, the most that the evidence shows is that she knew what was going to happen when she saw appellant's pistol as she exited the cab.

65. In determining whether Ms. Pessina was an accomplice, the test is whether she could have been convicted of any of appellant's crimes. *United States v. McKinnie*, 32 MJ 141, 143 (CMA 1991). If the evidence in this case "raises a reasonable inference that [Ms. Pessina] may have been an accomplice," then the military judge should have allowed the question whether she was an accomplice to have been submitted to the court members with proper instructions upon request. *United States v. Gillette*, 35 MJ 468, 470 (CMA 1992).

We hold that the military judge correctly refused to allow Ms. Pessina to be treated as an accomplice. Even if we construe all the evidence and inferences in the light most favorable to appellant's theory, they fall short of making Ms. Pessina an accomplice. Indeed, in his detailed confession, appellant told SA Schnayerson that Ms. Pessina "didn't have anything to do with it. Nothing at all. She didn't know nothing."

66. There is no evidence that Ms. Pessina knew of the robberies and murders beforehand, that she aided or encouraged them, or that she shared appellant's criminal intent. *See United States v. Knudson*, 14 MJ 13, 15 (CMA 1982) ("The law requires that it be established that there is a concert of purpose or the aiding or encouraging of the commission of the criminal act and a conscious sharing of the criminal intent."). Her knowledge of appellant's robberies and murders after the fact, her failure to stop appellant from robbing Mr. Harrison, her failure to report appellant's crimes after he admitted them to her were insufficient to make her an accomplice. *See* para. 1b(3)(b), Part IV, Manual for Courts-Martial, United States, 1984 ("Mere presence at the scene of a crime does not make one a principal. . . ."); *United States v. Pritchett*, 31 MJ 213, 217 (CMA 1990) ("[M]ere



presence at the scene of a crime committed by another is not sufficient evidence. . . ."); *United States v. Epps*, 25 MJ 319, 321 (CMA 1987) ("failure to stop" a crime is not sufficient). Her less-than-candid initial statements to the police may have made her an accessory after the fact, but no more. *See* Art. 78, UCMJ, 10 USC § 878; para. 3b(4), Part IV.

While Ms. Pessina may have been an accomplice to appellant's offenses involving cocaine, those offenses were not before the court. Appellant's theory was that Ms. Pessina was an accomplice to the murders and robberies. Unlike the accomplice contemplated by the law, Ms. Pessina was not trying to save herself at appellant's expense. To the contrary, all the evidence indicates that she was trying to protect him. Accordingly, we hold that the military judge properly refused to treat Ms. Pessina as an accomplice.

**2. Ms. Pessina as a hostile witness**

67. Ms. Pessina was called as the first defense witness on the merits. After defense counsel questioned her about her place of birth, family background, education, language abilities, marital status, previous residences, immigration status, and present employment, trial counsel objected to defense counsel's leading questions. The military judge excused the court members and convened an Article 39(a) session. Defense counsel argued that Ms. Pessina was "a key person in the investigation" and that he was "compromised in [his] ability to present evidence" without using leading questions. Upon inquiry by the military judge, defense counsel stated that Ms. Pessina had cooperated in submitting to interviews but had not been responsive to all his questions and that he had not asked her about certain areas which he intended to explore on direct examination. Trial counsel stated that he "would not object to leading questions" if Ms. Pessina demonstrated during her testimony "that she is, in fact, hostile." The military judge then concluded the Article 39(a) session by ruling, "She's not a hostile witness—not now."

Defense counsel then questioned Ms. Pessina on her relationship with appellant, her knowledge of appellant's crimes, her driving the car used in the 7-Eleven robberies, her conversations with appellant after the 7-Eleven robberies, her use of cocaine with appellant, the events leading up to the robbery and attempted murder of Mr. Harrison, the two searches of her residence, and her withholding of information from the police. At that point trial counsel again objected to use of leading questions. Defense counsel again asked permission to use leading questions, arguing that "[s]he is clearly adverse to my client." The military judge responded, "No—absolutely ridiculous. Proceed."

At that point the president of the panel asked the military judge to define an "adverse witness." The military judge explained that counsel were arguing about whether they should be allowed to ask leading questions as an exception to the general prohibition against leading questions on direct examination.

68. After a few more minutes of testimony, the military judge sustained another prosecution objection to leading questions. Defense counsel argued: "The testimony that I seek to elicit from her is that [the police] told her that she was the key witness in the case against Dwight Loving; which makes her—in the defense view—an adverse witness to my client." With the panel members still present, the following exchange then occurred:

> MJ: I told you that was ridiculous, before. How many times have I gotta tell you it's ridiculous? The objection is sustained.
>
> DC: Yes, sir.
>
> MJ: Don't challenge me.
>
> DC: Yes, sir. We will—we would like to submit a written brief, on this, at a later date, if we could, to make sure that we note all the objections we have.
>
> MJ: No.



> DC: No.
>
> MJ: You've entered your objections—
>
> DC: All right—
>
> MJ: —I have listened to your objections—three or four times—I have sustained; and, you're not going to ask any leading questions.
>
> DC: Yes, sir.
>
> MJ: So, please, drive on.
>
> DC: We feel this—
>
> MJ: You open your mouth about it, again, counsel, and I'm going to clear the courtroom and we're going to have a discussion.
>
> DC: Yes, sir.
>
> IDC [Major Hayden]: Your Honor, may we have a side-bar?
>
> MJ: I think we'd better. Gentlemen, why don't you take a break. Court's in recess.

The military judge then convened an Article 39(a) session. Individual defense counsel (Major Hayden) expressed concern about the military judge's characterization of the defense position as "absolutely ridiculous." The military judge offered to give a curative instruction and invited the defense to draft an appropriate instruction. He concluded the session by explaining:

> But, I'll tell you—and, especially you (to defense counsel)—that I'm not going to be challenged. When I tell you a ruling—when I give you a ruling—that's it. I'll be more than happy to reconsider; but, you have to tell me, "Please, Judge, reconsider; based on X, Y, and Z." You just can't keep bringing it up—especially, in

> front of the court members. Now, they asked a question about what an adverse witness is all about. You just can't keep bringing it up, and in my view, try and challenge the bench. That's what I perceived it as . . . but I understand your point; and, I will be more than happy to work with you. Major Hayden, you fashion some language that you think appropriate. . . . Please—if you want to write something out—show it to the prosecutor. Court is in recess.

After a short recess the Article 39(a) session resumed, and defense counsel requested, for the fifth time, that the military judge reconsider his ruling on leading questions. After extensive argument by both sides, the military judge again denied the request.

69. Defense counsel then moved for a mistrial based on the military judge's characterization of the defense argument as "absolutely ridiculous," and objected to any curative instruction at that point in the trial on the ground that they did not "want to 'red flag' that any more than it has occurred, at this time." The military judge denied the request for a mistrial and acceded to the defense request that no on-the-spot curative instruction be given. Thereafter, Ms. Pessina was questioned at length by counsel for both sides, court members, and the military judge, with no further clashes between the military judge and counsel.

Mil.R.Evid. 611(a) directs the military judge to "exercise reasonable control over the mode and order of interrogating witnesses. . . ." Mil.R.Evid. 611(c) permits use of leading questions on direct examination if the witness is "a hostile witness or a witness identified with an adverse party." The question whether to permit "leading questions is discretionary with the military judge." Drafters' Analysis of Mil.R.Evid. 611(c), Manual, *supra* at A22-44 (Change 2.) *See Nutter v. United States*, 412 F.2d 178, 183 (9th Cir.1969) ("The decision to declare a witness hostile . . . is within the court's discretion and will be grounds for



reversal only on showing an abuse of that discretion."), *cert. denied*, 397 U.S. 927, 90 S.Ct. 935, 25 L.Ed.2d 107 (1970).

We hold that the military judge did not become an advocate for the Government or abuse his discretion by refusing to declare Ms. Pessina a hostile witness. It was obvious that she felt great affection for appellant and had attempted to protect him. She answered without resistance or evasion even when questioned about the intimate details of her relationship with appellant, her use of cocaine, her marriage, and her knowledge of appellant's criminal conduct.

J. *The military judge called the defense theory of the case "ridiculous" in the presence of the court members and threatened to deal with defense counsel when he challenged the ruling.*

70. Appellant contends that he was denied a fair trial because the military judge characterized the defense theory as "ridiculous" in the presence of the court members. We hold that appellant was not prejudiced by the military judge's remarks.

It was obvious to the court members, as indicated by the panel president's question, that the controversy was not about the facts of the case or the defense theory, but rather about whether defense counsel should be allowed to ask leading questions on the ground that Ms. Pessina was hostile. Our review of the military judge's remarks, in the context in which they were made, satisfies us that the panel members understood that only defense counsel's assertion that Ms. Pessina was hostile, and not the overall defense theory, was covered by the judge's comment.

We also hold that the military judge did not show bias against appellant. The military judge's remarks clearly were directed at defense counsel's refusal to accept his ruling on leading questions and counsel's continued challenging of the military judge in the presence of the court members. While the remarks may have been intemperate, they were not disqualifying. *See Liteky v.*

*United States*, __ U.S. at __, 114 S.Ct. at 1157 ("expressions of impatience, dissatisfaction, annoyance, and even anger" not sufficient to establish "bias or partiality"; "even a stern and short-tempered judge's ordinary efforts at courtroom administration" do not establish bias or partiality.)

K. *The military judge displayed his dislike for defense counsel throughout the trial by making critical comments.*

Virtually all of the comments complained of have been discussed with respect to Issue IV, subissue E(1), *supra* 14 M.J. at (82) and Issue IV, subissues F and G, *supra* 27 M.J. at (90) and (91). In addition, appellant asserts that the military judge implied "that defense counsel was a liar for suggesting that Mr. Sharbino" lost consciousness "instantly after being shot." Final Brief at 145.

71. This assertion is unsupported by the record. The discussion referenced by appellant occurred just prior to sentencing arguments and pertained to items proposed by the defense to be listed by the military judge as mitigating factors. After individual defense counsel requested a ruling on the proposed mitigating factors prior to making his argument, the military judge said, "Well, I have some difficulty with number eighteen," which recited that "[t]he murder victims experienced minimal pain and suffering." Defense counsel argued that the forensic pathologist had testified that "any kind of major brain trauma . . . would have resulted in immediate loss of consciousness." After trial counsel argued that "[w]e don't know what these people went through," the military judge agreed with trial counsel, but told defense counsel, "Now, you can certainly argue whatever you want to argue in that regard to the court members, but I'm not going to list that as a mitigating factor." In our view, the military judge's ruling and comment fall far short of implying that defense counsel was lying.



**ISSUE V**

**WHETHER APPELLANT WAS DENIED A FAIR TRIAL DUE TO NUMEROUS ACTS OF PROSECUTORIAL AND LAW ENFORCEMENT MISCONDUCT, WHICH INCLUDE HIDING EXCULPATORY EVIDENCE, DESTROYING POLICE NOTES CONCERNING 16 MINUTES OF APPELLANT'S CONFESSION, LYING ABOUT MS. PESSINA'S INVOLVEMENT IN THE CRIMES TO THE JUDGE AND PANEL, AND USE OF A SURPRISE WITNESS WITHOUT REASONABLE NOTICE AND WITHOUT PROVIDING APPROPRIATE DISCOVERY.**

72. Appellant asserts that exculpatory evidence, in the form of tests of his blood for alcohol and drug abuse, were illegally hidden from the defense. His assertion is unsupported by the evidence. Although blood, saliva, and hair samples were taken from him, they were not tested for alcohol or drugs because neither side requested such tests. The evidence which appellant asserts was hidden from him did not exist. Govt.App. Ex. 6, ¶ 4.

Appellant asserts that SA Schnayerson's interview notes for a 16-minute period preceding appellant's confession were concealed from him. He claims that the last entry in SA Schnayerson's notes was made at 7:56 p.m. and Investigator Wedge's investigative report reflects that appellant confessed at 8:12 p.m. Based on this evidence he speculates that there must have been additional entries which were concealed because they reflected coercive interview tactics. Final Brief at 171-72. In a post-trial affidavit SA Schnayerson asserts that there are no missing notes. Also, Government Appellate Exhibit 7 (Vol. VII, Appellate Papers) includes a page of SA Schnayerson's notes with entries at 7:58 and 8:05 and noting the confession at 8:12. Furthermore, Investigator Wedge's report reflects that at approximately 8:00

p.m. he was advised that the murder weapon was found at Ms. Pessina's residence, and he interrupted SA Schnayerson to inform him of the results of the search in appellant's presence. This Court is unwilling to assume sinister motives based on this evidence, especially when the defense chose not to litigate the voluntariness of appellant's confession at trial.

73. Appellant also asserts that Investigator Wedge's handwritten notes, made while observing the interrogation of appellant by SA Schnayerson, "have vanished without a trace." Final Brief at 170. This assertion is unsupported by the record. Investigator Wedge's investigative report recites that his interview notes were dictated onto microtape and transcribed. He also recited that his handwritten notes were marked as evidence and secured. At an Article 39(a) session on March 17, 1989, trial counsel represented that he had provided the defense with a "four-inch-thick packet" from the Killeen Police Department, as well as reports from the FBI and the Texas Rangers. Trial counsel recited, "I just don't know of anything, out there, possibly, that they couldn't have." The military judge specifically asked about investigator's notes, and trial counsel responded:

> It had everything. Yes, it had the notes—written—and, typed reports. . . . If there is something else, out there—if the defense is made aware—or, if something comes up—I'll be happy to issue a subpoena.

At no time during subsequent Article 39(a) sessions or during the trial on the merits did the defense complain about the absence of Investigator Wedge's handwritten interview notes, even though they were specifically mentioned in his typed report of investigation. During Investigator Wedge's testimony on the merits, defense counsel did not cross-examine him about the allegedly missing notes. Based on the record before us, we will not presume noncompliance with the discovery request or that the notes were hidden or destroyed.



Appellant's assertion that the prosecution concealed evidence of Ms. Pessina's involvement in the crimes is unsupported by the record. Ms. Pessina's personal life, marital status, relationship with appellant, drug use, and involvement in the crimes were fully explored on the record. There is not one iota of evidence that the prosecution withheld information from the defense about Ms. Pessina.

Appellant's assertions concerning Private Brown's testimony as a "surprise witness" are without merit for the reasons set out in our disposition of Issue IV, subissue H, *supra* at 259.

**ISSUE IV**

WHETHER MILITARY DUE PROCESS AND ARTICLES 66 AND 67, UCMJ, 10 USC §§ 866, 867 REQUIRE THIS COURT AND THE COURTS OF MILITARY REVIEW TO REVIEW ALL CAPITAL CASES *IN FAVOREM VITAE* SINCE CAPITAL LITIGATION IS IN ITS INFANCY IN THE MILITARY JUSTICE SYSTEM AND TRIAL AND APPELLATE DEFENSE COUNSEL LACK THE TRAINING AND EXPERIENCE NECESSARY TO PRESERVE THE RECORD ON ALL ISSUES AND PREVENT APPLICATION OF WAIVER.

74. Appellant requests this Court to refrain from applying "waiver to any issues not technically preserved by trial defense counsel"; specify any meritorious issues not raised by appellate defense counsel; and "order that a death sentence may not be affirmed unless the Courts of Military Review and this Court are satisfied beyond a reasonable doubt that the findings and sentence are proper." Final Brief at 197.

As conceded by appellant, this *in favorem vitae* ("in favor of life") approach to appellate review of capital cases has been rejected by the Supreme Court. *See Smith v. Murray*, 477 U.S.

527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). To the extent that appellant asks us to suspend the waiver provisions of Mil.R.Evid. 103 and the scope of appellate review under Articles 66 and 67, UCMJ, 10 USC §§ 866 and 867 (1989), respectively, we decline to do so. Those powers are reserved to Congress and the President.

Furthermore, we are not persuaded that such a broad scope of *de novo* review is warranted. While the military counsel in this case had limited experience in capital cases, most of the issues in this case dealing with pretrial discovery, *voir dire*, selection of court members, admissibility of evidence, and the like are not peculiar to captial cases. The broad power of plenary review exercised by Courts of Military Review, as well as this Court's authority to specify issues; order a hearing under *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967); apply the "plain error" doctrine; and find counsel ineffective for egregious errors, provide ample protection for the accused in this case.

**ISSUES VII AND VIII**

WHETHER THE GOVERMENT'S FAILURE TO GIVE NOTICE OF THE AGGRAVATING CIRCUMSTANCES THEY INTENDED TO PROVE, OTHER THAN THOSE SPECIFICALLY LISTED IN RCM 1004, VIOLATED THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

WHETHER THE MILITARY JUDGE ERRED IN INSTRUCTING APPELLANT'S SENTENCING PANEL THAT THEY COULD CONSIDER AGGRAVATING CIRCUMSTANCES OF WHICH THE DEFENSE HAD BEEN GIVEN NO NOTICE PRIOR TO TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.



75. Appellant contends that because the prosecution failed to give pretrial notice of evidence in aggravation, "[t]he unforeseen ambush of additional aggravating factors had an overwhelming prejudicial effect." Final Brief at 205. We hold that appellant's constitutional rights under the Fifth, Sixth, and Eighth Amendments as well as his rights under Article 55, UCMJ. 10 USC § 855, were not violated.

Surprises should be avoided in capital sentencing. *See Smith v. Estelle*, 602 F.2d 694, 699-703, *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In a capital case, RCM 1004(b)(1) requires the prosecution to give the defense written notice of the "aggravating factors" set out in (c) that it intends to prove. RCM 1004(b) specifically provides that the capital sentencing procedures are in addition to those in RCM 1001. RCM 1001(b)(4) allows the prosecution to present evidence in aggravation. Although RCM 1001(b)(4) has no specific notice requirement, RCM 701(a)(5) requires disclosure of sentencing evidence upon request of the defense. Compliance with these rules will eliminate surprises during the sentencing hearing.

Prior to appellant's trial the prosecution complied with RCM 1004(b)(1) by serving the defense with written notice of the Government's intent to prove six aggravating factors. Appellant does not contest the prosecution's compliance with RCM 1004(b)(1), but asserts that he was "ambush[ed]" by proof of the following aggravating circumstances (Final Brief at 205) not included in the prosecution's written notice; (1) appellant's records of nonjudicial punishment; (2) Captain Bush's testimony regarding appellant's lack of rehabilitative potential; (3) "the nature of the weapon used" in "the offenses and the fact that" appellant "fired the weapon during the course of each offense";

(4) the fact that appellant "killed his victims after they had fully cooperated"; (5) "the nature and extent of the injuries suffered by the victims"; (6) appellant's "lack of any remorse"; and (7) appellant's statements to PVT Brown "that the first killing was to see if he could get away with it and, after that, it was for fun." Final Brief at 203.

76. The record does not support appellant's claim of a trial by ambush. Prior to trial, defense counsel requested disclosure of sentencing evidence. When compliance with discovery requests was discussed at an Article 39(a) session prior to the trial on the merits, defense counsel made no complaint. At an Article 39(a) session prior to the sentencing hearing, trial counsel listed the evidence he intended to introduce, which included appellant's service records, his records of nonjudicial punishment, and CPT Bush's testimony. Although defense lodged several objections, none were based on lack of pretrial disclosure.

With respect to the testimony of Private Brown, we resolved the issue of adequate notice against asppellant in our disposition of Issue IV, subissue H, *supra* 41 MJ at 259. On the basis of the record before us, we hold that appellant's claim of inadequate notice is not supported by the evidence.

**ISSUE IX**

WHETHER APPELLANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, IN THAT APPELLANT WAS GIVEN THE DEATH PENALTY BASED UPON A CONGLOMERATION OF AGGRAVATING FACTORS WHICH INEXTRICABLY DOUBLE COUNTED APPELLANT'S CRIMES

77. Appellant's court-martial unanimously found, beyond a reasonable doubt, that the following aggravating factors had been



proven: (1) "The premeditated murder of Bobby Gene Sharbino was committed while" appellant "was engaged in the commission or attempted commission of a robbery" (RCM 1004(c)(7)(B)); (2) appellant "was the actual perpetrator of the killing" in the felony murder of Christopher Fay (RCM 1004(c)(8)); and (3) "[h]aving been found guilty of premeditated murder of Bobby Gene Sharbino," appellant was also convicted "of another violation of Article 118, UCMJ, in the same case" (RCM 1004(c)(7)(J)). These findings as to aggravating factors were consistent with the court-martial's unanimous findings of guilty as to the premeditated murder of Bobby Gene Sharbino (specification 2 of Charge I); the felony murder of Bobby Gene Sharbino (specification 4 of Charge I), which was later dismissed as multiplicious; and the felony murder of Christopher Fay (specification 3 of Charge I).

Appellant contends that there was a double counting of aggravating factors, since the same two murders constituting the first two aggravating factors were used to constitute the third. *See United States v. Curtis* (Curtis I), 32 MJ 252, 269 (CMA), *cert. denied*, __ U.S. __, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991). He argues that the double counting was prejudicial because the court members sentenced him to death based on three aggravating factors, when there were only two. As we noted in our second consideration of *United States v. Curtis* (Curtis II), 33 MJ 101, 108 (CMA 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1177, 117 L.Ed.2d 421 (1992), "we doubt that the President intended for commission of a double murder to constitute two 'aggravating factors,' rather than only one."

In *Curtis II*, we remanded the case to the Court of Military Review to determine "[w]hether the number of 'aggravating factors' in th[at] case had any effect on the sentence." 33 MJ at 108. We need not remand appellant's case, however, because the Court of Military Review has already found, and we agree, "that the number of aggravating factors" did not affect the deci-

sion of the court-martial "to impose the death sentence." 34 MJ at 969.

78. Furthermore, unlike *Curtis II*, there was no double counting in appellant's case. In *Curtis II*, the following aggravating factors were found:

> 1) "the premeditated murder of" Mrs. Lotz "was committed while [Curtis] was engaged in the commission of a burglary";
>
> 2) "with regard to the premeditated murder of" Mrs. Lotz, Curtis had "been found guilty in the same case of another murder"—that of Lieutenant Lotz; and 3) "with regard to the premeditated murder of" Lieutenant Lotz, Curtis had "been found guilty in the same case of another murder"—that of Mrs. Lotz.

33 MJ at 108, *quoting* 32 MJ at 269 (*Curtis I*).

Appellant's case is distinguishable from *Curtis II*. In appellant's case the premeditated murder of Bobby Gene Sharbino was aggravated by two factors: (1) the murder was committed while appellant was engaged in the commission of a robbery, and (2) appellant was found guilty of another Article 118 violation (the felony murder of Christopher Fay) in the same case. RCM 1004(c)(7)(B). The felony murder of Christopher Fay was aggravated by one factor, that the accused was the actual perpetrator of the killing. RCM 1004(c)(8). The two aggravating factors applicable to the murder of Bobby Gene Sharbino are distinct from the aggravating factor applicable to the felony murder of Christopher Fay. Unlike *Curtis II*, the two murders were not used to aggravate each other. Although the felony murder of Christopher Fay was used to aggravate the premeditated murder of Bobby Gene Sharbino, the premeditated murder of Bobby Gene Sharbino was not used to aggravate the felony murder of Christopher Fay. Accordingly, we hold that there was no double counting of aggravating factors in appellant's case.



**ISSUE X**

**WHETHER APPELLANT'S DEATH SENTENCE IS INVALID UNDER THE FIFTH AND EIGHTH AMENDMENTS TO THE CONSTITUTION AND ARTICLE 55, UCMJ, BECAUSE THE SENTENCING PANEL WAS IMPROPERLY PERMITTED TO CONSIDER "LACK OF REHABILITATIVE POTENTIAL." "PRESERVATION OF GOOD ORDER AND DISCIPLINE," AND "SPECIFIC DETERRENCE" IN SENTENCING DELIBERATIONS.**

79. As previously noted in our disposition of Issue III, subissue F, *supra* at 246, appellant's records of nonjudicial punishment were admissible under RCM 1001(b)(2), and CPT Bush's testimony regarding appellant's previous performance of duty was admissible under RCM 1001(b)(5), but the military judge erred by characterizing that evidence as aggravating circumstances.

The question remains whether it was error for the military judge to permit the court-martial to consider "lack of rehabilitative potential" at all in a capital case. Appellant argues that rehabilitative potential was not in issue in this case, since life imprisonment was the mandatory minimum and a punitive discharge is included in a death sentence and is "virtually a foregone conclusion" even if death was not imposed. Final Brief at 217. *See* RCM 1004(e) ("A sentence of death includes a dishonorable discharge. . . ."). To the extent that CPT Bush's testimony was a prohibited euphemism for a punitive discharge (*see United States v. Ohrt*, 28 MJ 301, 305 (CMA 1989)), any error in its admission was waived and does not rise to the level of plain error. Mil.R.Evid. 103(a) and (d).

Nevertheless, appellant's past performance was not irrelevant. The defense case on the merits had included the testimony of SGT Key regarding appellant's erratic duty performance. *See*

Issue III, subissue F, *supra*. In addition, the defense submitted appellant's "good duty performance under the guidance of strong leadership" as a mitigating factor on sentencing. CPT Bush's testimony was relevant to determining whether appellant's performance under SGT Key's leadership merited consideration as a mitigating factor.

Appellant also contends that the military judge erred by instructing the members as follows:

> In the military, we recognize five principal reasons for sentencing those who violate the law . . . [T]hose principles are the following:
>
> Number one, protection of society from the wrongdoer;
>
> Number two, the punishment of the wrongdoer;
>
> Number three, the rehabilitation of the wrongdoer;
>
> Number four, the preservation of good order and discipline in the military; and
>
> Number five, the deterrence of the wrongdoer and those who know of his crime and his sentence from committing the same or similar type offenses.

80. Appellant now argues that the instruction "injected arbitrary and improper considersations into the sentencing deliberations." Final Brief at 218. He argues that only punishment and deterrence are relevant in a capital case. Final Brief at 211.

We hold that any issue as to the propriety of the military judge's instructions on sentencing principles was waived. Defense counsel objected only to mention of specific deterrence. Defense counsel specifically requested that a similar instruction be given during *voir dire* (R. 380-81), and did not object or propose additional instructions when it was given to deliberations on sentence. RCM 1005(f).



The context in which the instruction was given minimized any opportunity for misunderstanding. It was phrased in terms of general principles applicable to all cases involving "those who violate the law," not just appellant's case. The instruction followed very detailed instructions for voting on the aggravating factors relied on by the prosecution to qualify appellant for the death penalty, considering the other aggravating circumstances, weighing the aggravating factors and circumstances against the mitigating factors, and then determining whether to impose a sentence of death or life imprisonment. In context, the instruction merely presented a general philosophical background for the very specific and detailed instructions which had preceded it.

Finally, we disagree with appellant's assertion that protection of society and preservation of good order and discipline were not permissible consideration in this case. Protection of society was a consideration in this case, but the means available to the court-martial were limited in view of the mandatory minimum punishment. Defense counsel used this principle of sentencing to advantage by arguing that the needs of society for protection could be satisfied by life imprisonment, and they presented evidence that appellant adapted well to prison life and would not present a continuing danger in that controlled environment. Preservation of good order and discipline may have been redundant with deterrence in this case, but nevertheless was a relevant principle.

**ISSUE XI**

WHETHER APPELLANT'S DEATH SENTNECE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, IN THAT APPELLANT WAS DENIED A FAIR SENTENCING HEARING.

This issue involves four sub-issues that will be analyzed individually.

A. *Whether the military judge erroneously admitted into evidence punishments and vacations of suspensions of punishments under Article 15, UCMJ, and erroneously failed to limit the panel's consideration of this evidence, by instruction, to the character of appellant's prior service.*

We resolved this issue against appellant in connection with Issue III, subissue F, *supra* at 246.

B. *Whether the military judge erred in failing, sua sponte, to restrict the improper "rebuttal" testimonies of Ranger Aycock and Private Brown to the proper scope of rebuttal.*

We resolved this issue against appellant in conncetion with Issue III, subissue I, *supra* at 250, and Issue IV, subissue H, *supra* at 259.

C. *Whether trial counsel improperly bolstered the credibility of Ms. Pessina by declaring that her testimony was not immunized and she could not be charged with a criminal offense in conncection with this case.*

81. Appellant asserts that trial counsel improperly bolstered the credibility of Ms. Pessina by injecting information outside the record about her lack of immunity, eliciting testimony from Ranger Aycock that she could not be charged with joint possession of the marijuana found in her residence, and improperly arguing that she was not criminally involved in the offenses.

After her testimony on the merits, Ms. Pessina was asked by a court member, "Do you have any kind of immunity, to testify here at this court-martial?" She responded, "I no understand



'immunity' " Trial counsel interjected, "Your Honor, I'll make an offer of proof that no immunity has been offered, nor has any immunity been granted to this witness." Following further discussion and explanation, Ms. Pessina testified that no one had promised her anything for her testimony, except, "if I lie, I gonna go to jail." On redirect examination, defense counsel again raised the subject of immunity, to which Ms. Pessina replied, "They just say, if I lie, something gonna happen to me."

During trial counsel's argument on findings, he argued that appellant committed his crimes alone and "there was nobody else with him." He concluded by arguing, "If there is evidence of conspiracy or accomplice, then somebody better come forth and provide that to the Bell County District Attorney, because there is not enough yet to say that Nadia Pessina was involved in these crimes."

During the sentencing hearing, Ranger Aycock testified that a small quantity of marijuana was found in Ms. Pessina's residence, which she shared with Ms. Ira Printers and sometimes with appellant. Trial counsel asked, "[I]sn't it true that . . . there were no fingerprints found on the marijuana taken out of 909 Mimosa?" Ranger Aycock responded, "Major, there wasn't enough marijuana there to roll a good cigarette. . . . I don't know how you guys work it in the military . . . but in the State of Texas you've got to prove possession of a drug on someone. Joint possession is not going to get it. Your've got to put it on somebody and prove that it's theirs. . . ." Trial counsel remarked, "Ranger, that's true in the military too." When defense counsel objected, trial counsel withdrew his remark.

82. On the basis of the record before us, we hold that there was no improper bolstering of Ms. Pessina's testimony. This case is virtually the opposite of *United States v. Simtob*, 901 F.2d 799 (9th Cir. 1990), cited by appellant. Trial counsel was not attempting to bolster his own witness, because Ms. Pessina was a defense witness. The subject of immunity was introduced by a court

member and further developed by defense counsel on redirect examination. There was nothing to bolster because the absence of immunity was uncontroverted.

With respect to trial counsel's argument on findings, we hold that it was within the range of fair comment on the evidence. *See United States v. White*, 23 MJ 84, 88 (CMA 1986). Lastly, with respect to Ranger Aycock's testimony, we think it abundantly clear that Ranger Aycock was not vouching for Ms. Pessina's innocence, but only opining that he didn't have enough evidence to prove that she owned the marijuana.

D. *Whether trial counsel improperly bolstered the credibility of Private Brown by declaring that he was not immunized, had not asked for any favors, and was testifying only because he was ordered to do so.*

83. One final argument raised by appellant is that the testimony of Private Brown was improperly bolstered when trial counsel, during closing argument, stated that Private Brown never received any incentives for his testimony and appeared to testify truthfully based on his demeanor. Trial counsel's comment was based on Private Brown's response to a question from a court member who asked if he had been promised anything in return for his testimony. Private Brown responded that he did not want to testify but had been "ordered to," but that no one had promised him anything, including a reduction in his prison sentence, for his testimony.

Appellant's assertion that trial counsel insinuated facts outside the record is undermined by the record itself. Private Brown unequivocally testified, without contradiction, that he was promised nothing for his testimony. Furthermore, trial counsel's contention that PVT Brown's demeanor indicated his truthfulness was simply fair comment on the evidence. *See Dyer v. McDonnall*, 201 F.2d 265, 268-69 (2d Cir.1952) (demeanor of witness is evidence). We hold that trial counsel did not improperly bolster the credibility of Private Brown.



**ISSUE XII**

**WHETHER PRIVATE FORREST BROWN, A GOVERNMENT WITNESS AT SENTENCING, IMPEACHED THE VERDICT OF GUILTY OF THE FELONY-MURDER VERDICT OF FAY WHEN HE TOLD THE PANEL THAT APPELLANT EXPRESSLY DID NOT KILL IN FURTHERANCE OF THE ROBBERY (TO EFFECTUATE APPELLANT'S ESCAPE AS ARGUED BY THE GOVERNMENT ON THE MERITS), BUT INSTEAD KILLED FAY FOR FUN, MERELY "TO SEE IF HE COULD DO IT."**

84. During the sentencing hearing, PVT Brown testified that appellant told him that his reasons for "the shootings" were "to see if he could get away with it, and then he did it because it was fun." Appellant now argues that PVT Brown's testimony improperly impeached the verdict, because it contradicted trial counsel's argument on findings that appellant "at the time of the killing . . . was participating in the commission of a robbery, . . . [a]nd by killing them he prevents an identification of him with the robbery." Final Brief at 239. He asserts that the military judge should have *sua sponte* intervened and either set aside the conviction of felony-murder with respect to Christopher Fay or ordered Private Brown's testimony stricken.

We disagree with appellant's interpretation of the testimony. PVT Brown did not specify which "shootings" appellant was talking about, although PVT Brown referred to the 7-Eleven robberies as well as the robberies and murders of the cab drivers. More importantly, we reject appellant's theory that killing for fun and killing to prevent identification are mutually exclusive. We hold that the military judge had no legal duty to intervene.

**ISSUE XIII**

WHETHER THE MILITARY JUDGE ERRONEOUSLY DENIED APPELLANT'S MULTIPLICITY MOTION TO DISMISS THE UNANIMOUS FELONY-MURDER VERDICT, IN LIEU OF THE NONUNANIMOUS PREMEDITATED MURDER VERDICT.

85. Appellant was charged with both premeditated murder and felony murder with respect to both PVT Fay and Mr. Sharbino. Prior to arraignment appellant moved to dismiss the felony-murder specifications (specifications 3 and 4 of Charge I) as multiplicious. The military judge ruled "that it would be premature" to dismiss any specifications at that time, without hearing all the evidence. After findings, the defense renewed their motion to dismiss the felony-murder specifications. The prosecution requested that the nonunanimous conviction of the premeditated murder of Christopher Fay (specification 1 of Charge I) be dismissed so that the court-martial would have the option of considering the unanimous conviction of the felony murder of Christopher Fay (specification 3 of Charge I) as an aggravating factor. The military judge granted the prosecution's request.

Appellant now argues that the military judge erred by refusing to dismiss the felony murder specification. We hold that the military judge did not err. Even before our decision in *United States v. Teters*, 37 MJ 370 (CMA 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 919, 127 L.Ed.2d 213 (1994), we held that "if the same homicide is the subject of findings of premeditated murder and felonly murder, *one* should be set aside." *United States v. Hubbard*, 28 MJ 27, 34 (CMA 1989) (emphasis added), *cert. denied*, 493 U.S. 847, 110 S.Ct. 142, 107 L.Ed.2d 101 (1989). *See Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). We need not decide whether this requirement was affected by *Teters*, since the military judge eliminated



any possibility of multiplicity for findings by granting the prosecution's motion to dismiss. The military judge's decision to dismiss those findings left only the unanimous findings. By eliminating those findings about which one or more court members had a reasonable doubt, the military judge increased the reliability of the factors to be considered on sentencing. His ruling was well within the limits of his discretion.

**ISSUE XIV**

WHETHER THE MILITARY JUDGE DENIED APPELLANT A FAIR SENTENCING PROCEEDING UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ, WHEN HE LIMITED APPELLANT'S ABILITY TO PRESENT RELEVANT EXTENUATION AND MITIGATION EVIDENCE AND ARGUMENT TO THE MEMBERS.

86. Appellant asserts that he was denied a fair sentencing proceeding because of the military judge's rulings on four specific issues, which we will not analyze separately.

A. *Whether the military judge erroneously ruled that Ms. Fisher's testimony was based upon hearsay and was not relevant to the proceedings.*

After being called as a defense witness, Ms. Pessina denied needing money or asking appellant for money. She testified that she was employed and regularly received between $200.00 and $250.00 per month from her father.

Appellant presented rebuttal from SGT Key, who testified that Ms. Pessina smoked hashish in his presence, offered him "a drag," shared the hashish with another person who was present, told SGT Key that she sold drugs and showed him bags of drugs and money, and showed SGT Key where she hid her drugs and money.

Defense counsel requested that Ms. Ana Fisher be called as a witness in further rebuttal of Ms. Pessina's testimony. Ms. Fisher's sworn statement was proffered as evidence of her expected testimony. In her statement Ms. Fisher's stated that she had "heard rumors" in the Noncommissioned Officers Club bar that Ms. Pessina was indebted to drug dealers and that appellant was trying to help her obtain money. When asked by SA Schnayerson, the CID interrogator, if she wished to add anything to her statement, Ms. Fisher said:

> I'm not for sure, what I heard, when I heard that LOVING could get death, I thought I might can help out about some rumors I heard, I don't know if there [sic] true or not, and because about the TV and remembering things, I could be wrong about what I heard, I don't want to testify to this, because I'm not sure, I didn't think it would be a big thing, I just thought I would come up and tell someone and that would be it, but I can't testify on something I'm not sure about.

After trial counsel objected that Ms. Fisher's testimony would be "hearsay . . . on rumor," the military judge stated:

> I realize that the rules are relaxed and should be for a capital case, but that doesn't mean that the rules are completely thrown out. Ms. Fisher, from what I read in Appellate Exhibit CXLI . . . has nothing at all to offer to this case. . . . Absolutely nothing, unless you want to bring her on to tell us that she knows Private Loving and that sometime apparently last year that he was looking for money. . . . if there was something, anything, concrete here, I would allow it, but this is no good at all.

After further argument the military judge asked if the defense wanted to call Ms. Fisher "to tell the court members anything



about her involvement with Private Loving?" At that point defense counsel announced, "We don't . . . need her testimony, so we would rest."

87. Appellant now argues that Ms. Fisher's proferred testimony would have been "very probative and extremely relevant." Final Brief at 247. He cites *Green v. Georgia,* 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), in support of his argument.

We agree with government appellate counsel that *Green* is inapposite. That case involved testimony of a witness who heard the defendant's co-actor admit that he, and not the defendant, was the triggerman in a murder and rape. After the proferred testimony was excluded, the prosecutor argued that the defendant was the triggerman. The Supreme Court noted that the excluded testimony "was highly relevant . . . and substantial reasons existed to assume its reliability." 442 U.S. at 97, 99 S.Ct. at 2151. The uncertain barroom rumor offered by the defense in appellant's case is a far cry from the testimony of an eyewitness to a co-actor's confession in *Green.*

Even in a capital sentencing hearing, the military judge has discretion to exclude evidence having little probative value if its admission would be a waste of time and the evidence is cumulative. Mil.R.Evid. 403. In this case the probative value of Ms. Fisher's testimony was nil and would have been cumulative. We hold that the military judge did not abuse his discretion.

> B. *Whether the military judge erroneously refused to permit trial defense counsel to argue that the victim was rendered unconscious immediately and did not suffer as a result of his wound.*

88. This subissue misstates the record. The military judge refused to list Mr. Sharbino's lack of pain and suffering as a mitigating factor, but he expressly told defense counsel, "[Y]ou can certainly argue whatever you want to argue in that regard to the court members, but I'm not going to list that as a mitigating factor."

C. *Whether the military judge erroneously refused to allow testimony concerning appellant's susceptibility to manipulation by people he cared about.*

This subissue again misrepresents the record. The military judge excluded no evidence concerning appellant's susceptibility to manipulation. The portions of the record referenced in appellant's brief (at 249-50) pertain to a discussion of the military judge's instructions to the court members regarding mitigating factors. After some discussion about the evidence of manipulation, counsel for both sides agreed to the wording of the military judge's instruction, which told the court members that they could consider, as a factor in mitigation, that "during his early youth, the accused was a follower." We hold that the military judge did not err.

D. *Whether the military judge erroneously added a disclaimer to appellant's mitigating evidence concerning drug involvement.*

Appellant takes issue with the military judge's use of the words, "if any," after the ninth mitigating factor: "Drug involvement in any of these offenses that was demonstrated through the evidence, if any." We agree with government appellate counsel that the term "if any" is not a disclaimer but merely places the factfinding authority with the court members, where it belongs. Furthermore, since defense counsel did not object to the phrase, the issue was waived. RCM 1005(f).

**ISSUE XV**

**WHETHER THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, IN HIS FAILURE TO INSTRUCT THE PANEL MEMBERS THAT THE ONLY OFFENSES**



**FOR WHICH APPELLANT COULD BE SENTENCED TO DIE WERE FELONY MURDER AND PREMEDITATED MURDER AND THAT APPELLANT COULD NOT BE SENTENCED TO DIE ON THE BASIS OF THE CUMULATION OF ALL THE OFFENSES.**

We resolve this issue against appellant for the reasons stated in our resolution of Issue III, subissue J., *supra* 41 MJ at 251.

**ISSUE XVII**

**WHETHER THE MILITARY JUDGE IMPROPERLY MARSHALED THE EVIDENCE IN FAVOR OF THE GOVERNMENT WHEN HE SUMMARIZED THE GOVERNMENT WITNESSES' AGGRAVATION TESTIMONY, BUT DECLINED TO SUMMARIZE THE WITNESS TESTIMONY PRESENTED BY THE DEFENSE IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.**

90. Appellant asserts that the military judge unfairly "summarize[d] the bulk of the testimony of government witnesses in aggravation, but declined to summarize the defense evidence in like fashion." Final Brief at 259-60. Appellant specifically points to the treatment of the testimony of CPT Bush and PVT Brown in support of his assertion.

With respect to the testimony of CPT Bush, the military judge read from the list of aggravating factors submitted by the prosecution and discussed them during an Article 39(a) session. Defense counsel did not object to the description of CPT Bush's testimony. The military judge listed seven aggravating circumstances, including "the testimony of Captain Bush that the accused is of average intelligence and has been counseled on occasions in an effort to make him a satisfactory duty performer and, in his opinion, has no rehabilitative potential."

Regarding the testimony of PVT Brown, listed as the last of seven aggravating circumstances proposed by the prosecution, the military judge instructed the members as follows:

> Now, I'm going to leave it to you, the court members, to sift through all the evidence in this case and make determinations on those particular issues. I'm not going to try to pick out pieces of evidence and stick a label on it, whether it was remorse or lack of remorse. That's for you to decide. Those are the issues that you have to decide in this particular case.
>
> But the seventh aggravating circumstance is the testimony of Private Brown that the accused told Private Brown that the first killing was to see if he could get away with it and, after that, it was for fun.

Apart from the list of 17 mitigating circumstances and 7 aggravating circumstances proposed by counsel, the military judge merely listed the witnesses by name and documents by exhibit number. With respect to evidence of aggravating circumstances, he instructed:

> The United States, incidentally, presented some evidence during the sentencing phase of the trial and I'll get into that in just a few moments. Well, why don't I tell you now that they presented to you Captain Bush, obviously, I mentioned that just a few moments ago; Sergeant Uitenham, and Sergeant Kammon. They also presented certain documents during this presentencing phase of the trial. You may recall those were Prosecution Exhibits 96, 97, 99, 101, and 102. . . .

91. With respect to defense evidence, the military judge read from the list of mitigating circumstances submitted by defense counsel, mentioned the duration of appellant's pretrial confinement, his awards and decorations, and Defense Exhibits A through



Y. Lastly, he called the court members' attention to "the witnesses that were presented by the defense during . . . the sentencing phase of the trial." With respect to these witnesses, he instructed as follows:

> I won't try to summarize the testimony of these witnesses, I'll leave it to you to recall that testimony. Remember, though, what I said, though, about problems in recalling any testimony of a witness, you can play it back—or I'll have it played back for you if you desire. But anyway, the witnesses during the pre-sentencing phase of the trial: Lucille Williams; Ronald Loving; Gwendolyn Black; Harold Loving, and that was presented through a stipulation of expected testimony; Joe Loving, Sr.; Jimmy Verna; Kenneth Wilson, also through a stipulation of expected testimony; you heard from Sergeant Key, actually, you heard from Sergeant Key during the findings phase of the trial as well as in the sentencing phase of the trial, actually you heard it three times, you heard Sergeant Key three times; you also heard Sergeant Sanchez and Sergeant Mercardo, both IDF guards; Mr. Johnson about the accused's boxing experiences, amongst other things; and you also heard from Specialist Hall, another soldier assigned to the IDF. . . .

After explaining in detail how to use the sentence worksheet, the military judge concluded his instructions by telling the court members, "I want to make it clear, as I made clear, I hope, with the Findings Worksheet, that that shouldn't be somehow interpreted as an expression or opinion on my part, nor, for that matter, on counsel's part, as to what an appropriate sentence should be. That's your job and no one else's in this case." At the end of his instructions, the military judge asked, "Does counsel for either side have any objections to the instructions or requests not previously voiced?" Both sides responded in the negative.

We hold that the military judge did not err. After reviewing his instructions as a whole, we are satisfied that he carefully walked "the tightrope over which a trial judge must tread." *United States v. Shackelford*, 2 MJ 17, 19 (CMA 1976).

**ISSUE XVIII**

WHETHER THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, IN FAILING TO INSTRUCT THE PANEL IN THE PRESENTENCING HEARING TO DISREGARD ANY COMMENTS, STATEMENTS, OR GESTURES MADE BY THE MILITARY JUDGE WHICH MIGHT INDICATE AN OPINION ON HIS PART THAT APPELLANT SHOULD BE SENTENCED TO DEATH.

92. We hold that the military judge adequately instructed the court members against interpreting the military judge's words or actions as an expression of opinion regarding the sentence. As we noted in our analysis of Issue IV, subissue I, *supra* at 263, the military judge offered to give an on-the-spot curative instruction after the clash with defense counsel over the question whether Ms. Pessina was a hostile witness. Defense counsel objected to a curative instruction on the ground that it would "red flag" the issue. The military judge instructed the members as follows after presentation of the prosecution and defense cases in the merits:

> You must disregard any comments, any statements, any gestures that I may have made throughout the course of this trial that would seem to indicate an opinion on my part as to the guilt or innocence of this accused. That is your job and no one else's job. It would be not only unlawful, but it's certainly inappropriate for a military judge to attempt to influence you in any way regarding those ultimate—or that ultimate issue, guilt or innocence. . . .



After explaining the findings worksheet in detail, the military judge again cautioned the members that "this worksheet . . . must not be interpreted in any way as an opinion by myself or counsel, for that matter, concerning any degree of guilt of the accused."

During his instructions on sentencing, as noted in our analysis of Issue XVII, *supra* at 274, the military judge referred back to his earlier instructions regarding the findings worksheet and again cautioned them to ignore anything on the worksheet that could be interpreted as an expression of opinion by the military judge or counsel regarding the sentence. Counsel for both sides expressly stated that they had no objections to the instructions and did not request further instructions. We hold that no further instruction on the subject was required in the absence of a request for further elaboration or clarification. *See* RCM 920(f) (failure to object to instruction or omission of instruction constitutes waiver).

**ISSUE XIX**

WHETHER APPELLANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ, IN THAT THE MILITARY JUDGE'S INSTRUCTIONS ON DEATH SENTENCING PROCEDURES WERE INADEQUATE AND ERRONEOUS.

Appellant asserts three instructional deficiencies, which we will analyze separately.

A. *The military judge erred in failing to explicitly instruct that even if the members unanimously found one or more aggravating factors and even if the members unanimously determined that the extenuating and mitigating circumstances were substantially out-*

*weighed by the aggravating factors, each member still had the absolute discretion to decline to impose the death sentence.*

93. In support of this assertion of error, appellant relies on our guidance to the Court of Military Review on remand in *United States v. Curtis*, 33 MJ at 107 n. 8. In that case we said that the Court of Military Review should consider whether there must "be an explicit instruction to the effect that, even if the members unanimously find one or more aggravating factors and even if the members unanimously determine that the extenuating or mitigating circumstances are substantially outweighed by the aggravating factors, they will still have the absolute discretion to decline to impose the death sentence[.]"

We agree with defense counsel that the military death penalty procedures give the court-martial the absolute discretion to decline to impose the death penalty even if all the gates toward death-penalty eligibility are passed. The question is whether the military judge adequately advised the members that they had such discretion. We hold that he did.

The sentence worksheet (see Appendix) clearly speaks in terms of a permissible rather than mandatory death sentence. With respect to the aggravating factors, the worksheet instructs, "If the court-martial fails to find unanimously that at least one of the aggravating factors exist, you *may* not adjudge a sentence of death." (Emphasis added.) In his explanation of the worksheet, the military judge explained, "If these votes result in a unanimous finding that one or more circumstance has been proven, you *may* then consider, *along with all—with other possible sentences*, a sentence of death." (Emphasis added.)

94. Under the heading, "BALANCING OF AGGRAVATING AND EXTENUATING AND MITIGATING FACTORS," the worksheet instructs, "If the court-martial fails to unanimously find that any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including the factor(s) found as indicated in PART A, then you *may* not adjudge a sentence of death." (Emphasis added.)



The third part of the sentence worksheet provides for forfeitures of pay, confinement for life, a bad-conduct or a dishonorable discharge, and a death sentence. In connection with the third part, the military judge instructed as follows:

> I believe I've given you the maximum authorized punishment that you may adjudge in this case and that is, once again, a sentence to death, Dishonorable Discharge, forfeiture of all pay and allowances. I've also given you a mandatory minimum sentence and that would be life in prison. So, Colonel, when I get back the worksheet, I should see on the worksheet, *either a sentence to death or life in prison.* All right. Anyway, there is that maximum sentence that you can adjudge in this case.
>
> Obviously, it's a ceiling on your discretion, *you are at liberty to arrive at any lesser sentence based upon your own evaluation of the evidence that has been presented to you. . . .*

(Emphasis added.)

The military judge instructed the members that the vote for a death sentence must be unanimous and that a sentence to life imprisonment must be agreed upon by a three-fourths majority. At the conclusion of his instructions the military judge asked the court members if they had any questions and received a negative indication. He then asked counsel for both sides if they had any objections or requests, and they both responded in the negative.

We hold that the court-martial was adequately instructed as to their absolute discretion regarding imposition of the death sentence. The sentence worksheet, combined with the military

judge's instructions, made it clear that the death penalty was not mandatory but only permissible, even if all the gates toward death-penalty eligibility were passed by unanimous vote.

B. *The military judge erred in failing to define or describe the nature and purpose of "extenuation and mitigation" evidence.*

95. Appellant contends that the military judge should have instructed on "the meaning and function of mitigating circumstances"; that he did not define the "legalistic terms" of "mitigation," "extenuation," and "aggravation"; and that his failure to do so warrants reversal of his death sentence. Final Brief at 269-71. We hold that the military judge did not err by failing to provide further definition in the absence of a request.

When the sufficiency of instructions is attacked, "[t]he ultimate question is whether there is a reasonable possibility that the jury understood the instructions in an unconstitutional manner." *Peek v. Kemp*, 784 F.2d 1479, 1489 (11th Cir.1986) (en banc), *citing Francis v. Franklin*, 471 U.S. 307, 322-23 n. 8, 105 S.Ct. 1965, 1975-76 n. 8, 85 L.Ed.2d 344 (1985), *cert. denied* in *Peek*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986). We agree with appellant that there is a heightened need for reliability in capital punishment cases. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976). The Constitution does not require "any particular words or phrases to define the concept of mitigation or the function of mitigating circumstances. It is sufficient from a constitutional standpoint if it is clear from the entire charge considered in context that a reasonable jury could not have misunderstood the meaning and function of mitigating circumstances." *Peek v. Kemp*, 784 F.2d at 1494.

In this case the military judge listed all the aggravating circumstances presented by the prosecution as well as all the mitigating circumstances presented by the defense. In addition, he



instructed the members that they were permitted to consider evidence presented on the merits as well as the evidence in the sentencing hearing. He made it clear that aggravating factors and circumstances were presented by the prosecution in support of its request for the death penalty, and mitigating circumstances were presented by the defense in support of the lesser penalty of life imprisonment. While he did not furnish the members with technical legal definitions of "aggravation" and "mitigation," he made it clear what should be considered, by whom it was presented, for what purpose it was presented, and how aggravating circumstances and factors should be balanced against mitigating circumstances. In the absence of a specific request for clarification, no more was required.

C. *The military judge erred by failing to instruct the members as to the term "substantially outweighed" with regard to the relationship of mitigating circumstances to aggravating factors and circumstances.*

96. The military judge instructed the court members that they were not permitted to adjudge a death sentence unless they unanimously found "that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." This language is taken from RCM 1004(b)(4)(C), which provides that death may not be adjudged unless "[a]ll members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under RCM 1001(b)(4), including the factors under subsection (c) of this rule." Appellant contends that the military judge's failure to define "substantially outweighed" was plain error.

The test was not designed to be "mechanical." Drafters' Analysis of RCM 1004, Manual, *supra* at A21-66 (Change 2). After the members have made findings on the aggravating factors and moved to the next step in the sentencing process, members are

not required to make findings on aggravating and mitigating circumstances. Instead, they are required only to "consider" each circumstance and individually decide which circumstances are aggravating or mitigating and whether the aggravating circumstances, including those factors found unanimously, "substantially outweigh" the mitigating circumstances. Unlike findings of guilty or findings regarding aggravating factors under RCM 1004(c), "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant v. Stephens,* 462 U.S. at 876 n. 13, 103 S.Ct. at 2742 n. 13, *citing Jurek v. Texas,* 428 U.S. 262, 96 S. Ct. 2950, 49 L.Ed.2d 929 (1976).

The term "substantially outweighed" appears to have been taken from Mil.R.Evid. 403 and 609(b), Manual, *supra,* which use the same term with respect to the balance between probative value and prejudicial impact of evidence. Mil.R.Evid. 403 and 609(b) are identical to their counterpart Federal Rules of Evidence. In an evidentiary context, the term "substantially outweighed" is generally accepted as establishing a "slight presumption" to be applied in close cases. *See* S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 160 (5th ed. 1990); S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 435 (3d ed. 1991).

97. In the context of aggravating and mitigating circumstances, a requirement that aggravating factors and circumstances "substantially outweighed" mitigating circumstances merely requires court members to tip the balance against the death penalty in close cases. If the court members misunderstood the military judge's instruction and applied a higher standard such as proof beyond a reasonable doubt or by a preponderance of the evidence, such a mistake would inure to the benefit of appellant, since it would weight the balance more heavily against imposition of the death penalty. Accordingly, we hold that appellant was not prejudiced by the absence of a definition of the term "substantially outweighed."



**ISSUE XX**

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING THE TESTIMONY OF MRS. SHARBINO, THE VICTIM'S WIFE, WHEN HER TESTIMONY WAS CUMULATIVE, DID NOT CORROBORATE ANYTHING AND PREJUDICED APPELLANT BY INTRODUCING VICTIM IMPACT EVIDENCE INTO THE MERITS PORTION OF THE PROCEEDINGS.**

The issue was resolved against appellant in our disposition of Issue IV, subissue G, *supra* 41 MJ aty 258.

**ISSUES XXI, XXII, AND XXIII**

**WHETHER THE MILITARY JUDGE DENIED APPELLANT'S FIFTH AMENDMENT RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN HE TOLD THE PANEL THAT APPELLANT'S DEFENSE THEORY WAS "ABSOLUTELY RIDICULOUS" AND REFUSED TO GRANT A MISTRIAL.**

**WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN THE MILITARY JUDGE DENIED TRIAL DEFENSE COUNSEL'S REQUEST TO TREAT NADIA PESSINA SIMMONS AS A HOSTILE WITNESS AND THEN RESTRICTED COUNSEL'S EXAMINATION OF HER CONCERNING HER ROLE IN THE CRIMES.**

**WHETHER THE MILITARY JUDGE'S REFUSAL TO PROVIDE AN ACCOMPLICE TESTIMONY INSTRUCTION TO THE MEMBERS REGARDING THE TESTIMONY OF NADIA PESSINA**

SIMMONS VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

These three issues were resolved against appellant in our resolution of Issue IV, subissues J and I, *supra* 41 MJ at 264 and 260.

**ISSUE XXIV**

WHETHER THERE IS NO MEANINGFUL DISTINCTION BETWEEN PREMEDITATED AND UNPREMEDITATED MURDER ALLOWING DIFFERENTIAL TREATMENT AND SETENCING DISPARITY IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

98. Appellant argues that there is no meaningful difference between premeditated murder and unpremeditated murder. Accordingly, he argues that the military sentencing scheme fails constitutional muster because it does not "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S.Ct. 546, 554, 98 L.Ed.2d 568 (1988), *quoting Zant v. Stephens*, 462 U.S. at 877, 103 S.Ct. at 2742.

We hold that there is a meaningful distinction between premeditated and unpremeditated murder sufficient to pass constitutional muster. Premeditated murder requires proof of an additional element, "premeditated design to kill." Art. 118(1); para. 43b(1)(d), Part IV, Manual, *supra*. The phrase "premeditated design to kill" requires "consideration of the act intended." Para. 43c(2)(a). The Army Court of Military Review has described premeditated murder as a "killing . . . committed after reflection



by a cool mind." *United States v. Viola*, 26 MJ 822, 829, *citing* 2 *Wharton's Criminal Law* § 140 at 181 (C. Tortia, 14th ed. 1979), *aff'd*, 27 MJ 456 (CMA 1988). This Court has adopted the "cool mind" distinction. *United States v. Hoskins*, 36 MJ 343, 346 (1993). The Air Force Court of Military Review has observed, " 'Premeditation' is a term of art commonly employed and universally understood in the law of homicide." *United States v. Mansfield*, 33 MJ 972, 988 (1991), *aff'd on other grounds*, 38 MJ 415 (CMA 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1610, 128 L.Ed.2d 338 (1994). This Court has observed that, "[t]he words 'consideration of the act intended to bring about death' . . . have ordinary meanings and are readily understandable by court members." *United States v. Teeter*, 16 MJ 68, 72 (1983). We have no difficulty accepting the congressional determination that an intentional killing preceded by consideration of the fatal act with a "cool mind" is more serious and deserving of more severe punishment than an intentional killing without such consideration.

**ISSUE XXV**

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS BLURRED ANY DISTINCTION BETWEEN THE OFFENSES OF PREMEDITATED AND UNPREMEDITATED MURDER AND DELETED THE REQUIRED ELEMENT OF "PREMEDITATION" FROM THE OFFENSE OF PREMEDITATED MURDER IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

99. In his instructions on the elements of the offenses, the military judge described the difference between premeditated and unpremeditated murder as follows: "[P]remeditated murder requires as an element that the accused have a 'premeditated de-

sign to kill.' Unpremeditated murder requires the specific intent to kill or inflict great bodily harm without premeditated—premeditation." After a court member asked whether premeditation must be "in the general sense" or "in the specific sense," the military judge instructed as follows:

> "Premeditated design to kill" means the formation of a specific intent to kill and consideration of the act intended to bring about death. The "premeditated design to kill" does not have to exist for a measurable or particular length of time. The only requirement is that it must precede the killing.

The military judge asked the court member, "Does that help out?" The member responded in the affirmative. There was no objection by either party to the instruction and no requests for clarification from counsel for either side or any court member.

Appellant now argues that the military judge blurred the distinction between premeditated and unpremeditated murder by instructing the court members that both premeditation and intent to kill may be inferred from circumstantial evidence and that no lapse of time is required for either premeditation or intent to kill, and by failing to define premeditation beyond "consideration of the act intended."

We hold that the military judge's instructions were correct and did not require amplification. The words of this Court in *United States v. Teeter, supra,* bear repeating:

> The words "consideration of the act intended to bring about death: are not terms of art. They have ordinary meanings and are readily understandable by court members. It does not appear that the court members had difficulty with the instruction since they did not request clarification. There is no requirement that length be substituted for clarity. . . .



16 MJ at 72. Furthermore, since defense counsel did not request further definition of the terms "premeditated" and "unpremeditated," the issue was waived. RCM 920(f).

Finally, we note that the evidence in this case did not require a fine distinction between momentary premeditation and an intentional but unpremeditated killing. The evidence overwhelmingly established that appellant considered murdering the cab drivers well before he fired the fatal gunshots.

**ISSUE XXVI**

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS THAT ROBBERY REQUIRES A "CRIMINAL STATE OF MIND" WAS [SIC] IMPERMISSIBLY AMBIGUOUS AND LESSENED THE REQUIRED STANDARD IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

100. In connection with the charge of felony murder of Christopher Fay, the military judge instructed the court members on the seven elements of robbery with a firearm, as described in paragraph 47b, Part IV, Manual, *supra.* He described the first element as being "that, at Fort Hood, Texas, on or about 12 December 1988, the accused wrongfully took money from the possession and in the presence of Christopher L. Fay." He described the sixth element as being "that the taking of the property by the accused was with the intent to permanently deprive Christopher L. Fay and the Yellow Cab Company of the use and benefit of that property, that is, the cash." The military judge then defined wrongful taking, a term within the first element, as follows: "A taking is wrongful only when done without the consent of the owner and accompanied by a criminal state of mind."

In response to a question from a court member about the meaning of "criminal state of mind," the military judge defined

it as follows: "In other words, was it in the mind of the perpetrator to commit a crime . . . as opposed to some legal justification or excuse. . . ." The member indicated that he understood the definition. Counsel did not object to the definition or request further clarification.

Appellant now argues that the definition of wrongful taking in terms of a criminal state of mind rendered the element of specific intent in the sixth element ambiguous. We hold that the instruction was sufficient. On its face, the instruction distinguished between the specific intent to take the property and the criminal state of mind which makes the taking wrongful. In this case there was no issue of an innocent taking or a claim of right. *See, e.g., United States v. Kachougian,* 7 USCMA 150, 156, 21 CMR 276, 282 (1956); para. 46c(1)(d), Part IV, Manual, *supra.*

**ISSUE XXVII**

**WHETHER THE INSTRUCTIONS TO THE COURT MEMBERS WHICH PURPORTED TO DEFINE REASONABLE DOUBT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY LESSENING THE GOVERNMENT'S BURDEN OF PROOF.**

101. The military judge defined "reasonable doubt" as follows:

> By "reasonable doubt" is not intended a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in this case. It's an honest misgiving caused by insufficiency of proof of guilt. Proof beyond reasonable doubt means proof to a moral certainty, although not necessarily to an absolute or mathematical certainty. A "reasonable doubt" is a doubt which would cause a reasonably prudent person to hesitate to act in



> important and weighty personal affairs. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. . . .

Appellant did not object to the instruction at trial, but now contends that the instructions "constitute a prejudicial error by suggesting a degree of guilt below the reasonable doubt standard necessary for a conviction." Final Brief at 310. Appellant cites *Cage v. Louisiana,* 498 U.S. 39, 41, 111 S.Ct. 328, 330, 112 L.Ed.2d 339 (1990) (per curiam), in support of his argument.

This Court has considered an identical instruction and has resolved the issue adversely to appellant. *United States v. Meeks,* 41 MJ 150 (1994). *See Victor v. Nebraska,* __ U.S. __, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

**ISSUE XXVIII**

**WHETHER THE MILITARY JUDGE ERRONEOUSLY FAILED, *SUA SPONTE*, TO INSTRUCT THE PANEL MEMBERS IN BOTH PHASES OF THE COURT-MARTIAL THAT APPELLANT HAD THE RIGHT TO REMAIN SILENT AND HIS FAILURE TO TESTIFY COULD NOT BE CONSIDERED AGAINST HIM ADVERSELY.**

102. Appellant did not testify. He concedes that he did not request an instruction concerning his silence, but he argues that the military judge had a *sua sponte* duty to instruct because a court member questioned his silence. Final Brief at 318.

Appellant relies on a question from a court member concerning the distinction between direct and circumstantial evidence. The member asked, "The statements. He made a videotaped statement and said—is that direct evidence—" The military judge responded, "Is that direct evidence or circumstantial evidence?

It's direct." The member still had questions, so the military judge told the members, "[D]on't get confused by the distinction . . . [T]he law really makes no distinctions between the two . . . You can use either direct evidence or circumstantial evidence to decide any issue in this case. Okay?" The member indicated that he understood.

The premise upon which appellant makes his argument is unsupported by the record. The court member did not question his silence, but was concerned only with whether appellant's videotaped confession was direct or circumstantial evidence. We hold that the military judge was not required to instruct *sua sponte* concerning appellant's failure to testify.

**ISSUE XXIX**

**WHETHER THE MILITARY JUDGE ERRED IN FAILING TO GRANT A DEFENSE MOTION FOR CHANGE OF VENUE OR FAILING TO SEQUESTER THE PANEL.**

103. As we noted in our disposition of Issue IV, subissue A, *supra*, an accused is entitled to a change of venue only when pretrial publicity creates "so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial." RCM 906(b)(11) Discussion; *United States v. Gravitt*, 5 USCMA at 256, 17 CMR at 256. The military judge's ruling is reviewed for abuse of discretion. *Id.; United States v. Carter*, 9 USCMA 108, 112, 25 CMR 370, 374 (1958). We hold that the military judge did not abuse his discretion.

In an effort to minimize the effects of pretrial publicity, the convening authority detailed officers who had arrived at Fort Hood after January 1, 1989, or were assigned to commands outside Fort Hood. On January 31, 1989, the military judge issued an order directing trial counsel to inform all primary and alternate selectees "not to discuss with anyone the facts and circumstances of this case and further to refrain from intentionally listening [to] or reading any news or other accounts" pertaining to the charges against appellant. After individual *voir dire* and at the conclusion of each day's proceedings the military judge cautioned the members against discussing the case or intentionally exposing themselves to media coverage.



The military judge announced that he would be liberal in granting challenges for cause based on pretrial publicity. He invited the defense to renew the motion for change of venue if it appeared difficult to select an impartial panel.

After challenges by both sides, eight officers remained on the panel. COL Aylor, the president of the panel, was from Fort Sill, Oklahoma. The remaining seven officers were from Fort Hood. The *voir dire* of these eight officers revealed nothing to justify a change of venue. During general *voir dire*, no member indicated having obtained any information "through official channels" about the case. Six of the eight (MAJ Wilson, MAJ Napoli, CPT Weiss, CPT Williams, CW4 Giebner, and CW3 Hasenauer) indicated that they had heard about the case through the media. Two officers (MAJ Wilson and CPT Williams) had seen references to the case on television.

104. During individual *voir dire*, COL Aylor and MAJ Staples indicated having no media exposure to the case. The other six officers recalled some media coverage in general terms but could not remember specifics. The defense challenged none of the six for cause.

In light of the absence of any indication that the court members were influenced by pretrial publicity, the decision of defense counsel not to challenge any members for cause based on exposure to pretrial publicity, and the careful efforts of the convening authority and military judge to insulate court members from publicity about the case, we are satisfied that the military judge acted well within his discretion when he denied the motion for a change of venue and the request to sequester the court members.

**ISSUE XXX**

WHETHER THE MILITARY JUDGE'S WRONGFUL RESTRICTION OF VOIR DIRE ON THE ISSUES OF BUMPER STICKERS, VOLUNTEER WORK, DIVORCE, COMBAT EXPERIENCE, AND BOXING, AND CATEGORIZATION OF TRIAL DEFENSE COUNSEL'S TACTICS AS A "WASTE OF TIME," CHILLED COUNSEL'S VOIR DIRE QUESTIONING AND DENIED APPELLANT A FAIR TRIAL UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

We resolve this issue against appellant for the reasons set out in our disposition of Issue IV, subissue E, *supra* at 255.

**ISSUES XXXI AND XXXII**

WHETHER THE CONVENING AUTHORITY WAS RACIALLY BIASED AGAINST APPELLANT AS SEEN BY HIS INSISTENCE ON HAVING RACIAL IDENTIFIERS IN THE JURY POOL SELECTION SHEETS, THE DISPROPORTIONATE PERCENTAGE OF BLACKS IN THE JURY POOL AS COMPARED TO THE POPULATION OF BLACKS AT FORT HOOD, AND THE ACTIONS TAKEN BY THE CONVENING AUTHORITY AFTER HE PICKED AN ALL WHITE JURY IN A BLACK-ON-WHITE CRIME WHERE APPELLANT IS BLACK.

WHETHER APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS BECAUSE THE PANEL MEMBER SELECTION POOL DID NOT INCLUDE ANY FEMALES.



105. At trial appellant challenged the referral and member selection process, arguing that blacks and females were underrepresented. We hold that appellant has failed to make a *prima facie* showing of either racial or gender discrimination.

Appellant's case initially was referred to the general court-martial appointed by Court-Martial Convening Order (CMCO) 1. The senior officer on that order, COL Burch, is black. All the remaining court members, including the enlisted members, were white, except for MAJ Castro, reflected as "other." (Appellate Exhibit (App. Ex.) LII at 9-15.)

Although there were no female officers detailed as primary members of that panel, the evidence presented by the defense reflects that in January 1989, when the convening authority, Major General (MG) Streeter, selected panels for general courts-martial and special courts-martial, including the panel detailed on CMCO 1, there were 11 woman nominated and 9 selected for court-martial duty. One officer (MAJ Nowack) was among 7 officers detailed to serve on BCD special courts-martial. Of the 30 officers detailed as alternate members for general courts-martial and special courts-martial, 4 were women: CPT Lutz, Alternate #2; CPT Johnson, Alternate #6; and First Lieutenant (1LT) Cruz, Alternate #17; 1LT Thomas, Alternate #22. Of the 20 enlisted soldiers detailed as alternate members for general courts-martial and special courts-martial, 4 were women: Specialist Jones, Alternate #4; SGT Darymple, Alternate #8; SSG Brownlow, Alternate #12; and SGT Holiday, Alternate #15.

On or about February 15, 1989, in order to minimize the impact of pretrial publicity, MG Streeter withdraw appellant's case from the court-martial appointed by CMCO 1. The staff judge advocate (SJA) had prepared a pool of nominees, officer and enlisted, who had arrived at Fort Hood after January 1. (App. Ex. XLI at 11-12.) Because the pool of eligible nominees included so few senior officers, the SJA requested additional officer nominees in the grades of colonel and lieutenant colonel

from commands outside Fort Hood. (R. 23) A new pool of 45 nominees composed of officers from both Fort Hood, Texas, and Fort Sill, Oklahoma, was prepared. In that pool were four black officers from Fort Hood: MAJ Staples, MAJ Taylor, CPT Austin, and Chief Warrant Officer 3 Mark. MAJ Stapes and MAJ Taylor were selected as alternate members. All primary selectees were white males. (App. Ex. LXVIII at 10-12; CMCO 4.)

106. On February 21, 1989, appellant requested that enlisted members be detailed to his court-martial. That request was motivated in part to obtain "a more representative panel." In response to appellant's request for enlisted members, the SJA presented MG Streeter with a roster of all enlisted personnel who had arrived at Fort Hood after January 1, 1989. (App. Ex. XLVII at 3-14.)

If soldiers in pay grades E-1 and E-2 are excluded, there were 181 eligible nominees on the roster. *See United States v. Yager*, 7 MJ 171 (CMA 1979) (soldiers below pay grade E-3 unlikely to meet requirements of Article 25, UCMJ, 10 USC § 825). There were 158 males (87.3% of the total); and 23 females (12.7% of the total). There were 106 whites (58.6% of the total) and 57 blacks (31.5% of the total). MG Streeter selected 6 primary enlisted members, of whom 4 were black (66.7% of those selected), and 1 was female (16.7% of those selected).

MG Streeter also selected 11 alternate enlisted members of which 5 were black (45.5% of the total) and 2 were female (18.2% of the total). In the aggregate, of 17 enlisted soldiers selected for court-martial duty as either primary or alternate members, MG Streeter selected 9 blacks (53% of that total) and 3 females (17.6% of that total).

On March 23, 1989, appellant withdrew his request for enlisted members and requested an all-officer panel. On March 24, MG Streeter relieved the enlisted members and detailed 5 additional officers, including MAJ Staples, a black male. Five alternate members were designated, including MAJ Taylor, a black male. (App. Ex. LXVIII at 1-3; CMCO 8.)



Appellant attacks the selection process on three grounds. He asserts that he was denied his Sixth Amendment right to trial by a "jury" composed of a fair "cross-section of the community." He further asserts that blacks and females were systematically excluded in violation of the Due Process Clause of the Fifth Amendment and Article 25. Lastly, appellant suggests that his court-martial was "stacked" with white males to ensure that a death sentence would be adjudged. Final Brief at 347-48.

107. The Supreme Court addressed the Sixth Amendment "fair cross-section" requirement in *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), holding:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. at 364, 99 S.Ct. at 668. The "fair cross-section" requirement of the Sixth Amendment applies only to the pool of eligible jurors, not to the jury that was actually empaneled, "absent a pattern of systematic exclusion of a particular class," *United States v. Olson*, 846 F.2d 1103, 1117 n. 16 (7th Cir. 1988).

In *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the Supreme Court addressed a claim of systematic exclusion in the context of the Equal Protection Clause of the Fourteenth Amendment which applies to the United States through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The Supreme Court held that proof of systematic exclusion requires proof of the following:

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [jurors], over a significant period of time. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. . . .

430 U.S. at 494, 97 S.Ct. at 1280 (citations omitted). *See Morgan v. United States,* 696 F.2d 1239, 1240 (9th Cir.1983) ("claim of unconstitutionally selected jury implicates" Sixth Amendment as well as "the Fourteenth Amendment right to equal protection of the laws incorporated in the Due Process Clause of the Fifth Amendment").

When a Fifth Amendment or Fourteenth Amendment violation is asserted, statistics may be used to prove discriminatory intent. *Alston v. Manson,* 791 F.2d 255, 257-59 (2d Cir. 1986), *cert. denied,* 479 U.S. 1084, 107 S.Ct. 1285, 94 L.Ed.2d 143 (1987). A *prima facie* case of systematic exclusion is not established by the absence of minorities on a single panel. *See Castaneda v. Partida,* 430 U.S. at 494, 97 S.Ct. at 1280 (underpresentation proved by comparing population "to the proportion called to serve . . . over a signfiicant period of time"); *Ramseur v. Beyer,* 983 F.2d 1215, 1235 (3d Cir.1992) (underrepresentation not provided where "length of time documented . . . was only two years"); *Dobbs v. Kemp,* 809 F.2d 750, 752 (11th Cir.) (underrepresentation of women on a single jury list insufficient to make *prima facie* showing of discrimination), *cert. denied,* 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987).

108. Appellant points to inclusion of racial and gender identifiers on the lists of nominees in support of his assertion of



racial and gender discrimination. We will not presume improper motives from inclusion of racial and gender identifiers on lists of nominees for court-martial duty. We observed in *Un ed States v. Green,*37 MJ 380, 384 (CMA 1993), that "a convening authority is not required to be race-ignorant; he or she is only required to be race-neutral." Race and gender identifiers are neutral; they are capable of being used for proper as well as improper reasons.

Turning first to appellant's claim of a Sixth Amendment violation, we hold that appellant is not entitled to a "jury" composed of a fair cross-section of the community. The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial. *Ex Parte Quirin,* 317 U.S. 1, 39-41, 63 S.Ct. 2, 16-17, 87 L.Ed. 3 (1942); *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2, 137-38, 18 L.Ed. 281 (1866). This Court has observed that "Article 25 of the Uniform Code, 10 USC § 825; contemplates that a court-martial panel will not be a representative cross-section of the military population." *United States v. Smith,* 27 MJ 242, 248 (CMA 1988), *quoting United States v. Santiago-Davila,* 26 MJ 380, 389 (CMA 1988).

Even assuming arguendo that appellant was entitled to a representative cross-section of the eligible military population on his court-martial, he has not made his case. The limited relevant evidence presented by the defense, *i.e.,* the roster of enlisted personnel who arrived at Fort Hood after January 1, 1989, shows that blacks (67.7% v. 31.5%), and women (16.7% v. 12.7%) (*see* 41 MJ at 284), were overrepresented, not underrepresented, among the enlisted members detailed to sit on his case. *See* 41 MJ at 284.

Likewise, with respect to appellant's Fifth Amendment claim, we hold that appellant has failed to make a *prima facie* showing of systematic exclusion of eligible officers and enlisted soldiers. In support of the challenge to the court-martial selection pro-

cess, defense counsel presented demographic data for Fort Hood and Fort Sill as of mid-February 1989, showing the population by gender as well as by race. (App. Ex. XLI at 63 & 64.) In rejecting the defense challenge, the military judge characterized the raw demographic data as "somewhat irrelevant."

109. We agree with the military judge's characterization of the population data submitted by the defense in support of their motion. The population figures merely show the racial, ethnic, and gender breakdown of the military population of Fort Hood and Fort Sill as of mid-February 1989. They do not reflect how many black officers and female officers arrived at Fort Hood after January 1, 1989. Furthermore, they do not reflect the numbers or percentages of officers ineligible for court-martial duty. *See* paras. 7-2 thru 7-6, Army Regulation 27-10, Legal Services: Military Justice (1 July 1984) (chaplains; medical, dental, and veterinary officers; Army nurses; Army Medical Specialist Corps officers; and inspectors general ineligible for court-martial duty). Finally, they do not reflect the numbers or percentages of enlisted personnel in the lowest pay grades, who are unlikely to meet the requirement that they be "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperment." Art. 25(d)(2). *See United States v. Yager*, 7 MJ 171.

The defense presented no evidence of the number of black officers and female officers eligible for court-martial duty who arrived at Fort Hood between January 1 and February 15, 1989, the day the new panel was selected. Likewise, the defense presented no evidence that there were any black officers or female officers in the grades of colonel and lieutenant colonel at Fort Sill who were eligible and available for court-martial duty.

MG Streeter's reason for narrowing the pool of eligible court members was race-neutral and gender-neutral, as well as favorable to appellant. It was not challenged at trial or on appeal.

Trial counsel represented that MG Streeter routinely included blacks on courts-martial and on occasion even detailed blacks



who were not nominated by their respective commands for court-martial duty. Defense counsel did not dispute trial counsel's assertion. To the contrary, defense counsel stated that he will "stipulate" that blacks "routinely" were included on courts-martial appointed by MG Streeter.

The selection of enlisted members is the only selection process for which accurate population data was made a part of the record. The evidence presented at trial by the defense (App. Ex. XLVII at 3-14) reflects that in the enlisted ranks, both blacks and females were detailed in numbers greater than their proportion of the eligible population. *See* 41 MJ at 285-286.

110. Nevertheless, appellant asserts that the absence of blacks and females on the all-officer, all-white panel to which his case was referred establishes a constitutional violation. We reject his assertion for three reasons. First, as noted above, a *prima facie* claim of discrimination is not established by the absence of minorities on a single panel. Second, the panel about which appellant complains is not the panel that heard his case. Finally, when appellant objected to an all-white, all-male panel, the convening authority responded appropriately to his objection. He answered appellant's request for enlisted members by detailing blacks and females in numbers exceeding their proportionate share of the eligible population. The panel which actually heard the case included one black officer as a primary member; another black officer had been designated as an alternate. *See* 41 MJ at 284. Appellant has presented no evidence of tokenism and no evidence that female officers or other black officers who were eligible and available were improperly excluded from consideration.

111. The final issue is whether there is evidence of court stacking. *See United States v. Hilow*, 32 MJ 439, 441 (CMA 1991) (court stacked with supporters of "hard discipline"); *United States v. Smith*, 27 MJ 242 (CMA 1988) (female member added in case involving indecent assault on female officer); *United*

*States v. Hedges*, 11 USCMA 642, 29 CMR 458 (1960) (five of nine court members involved in law enforcement). Court stacking in courts-martial can occur by systematic exclusion. *See United States v. McClain*, 22 MJ 124 (CMA 1986) (systematic exclusion of junior officers and NCOs below E-7 to prevent "unusual" sentences); *United States v. Daigle*, 1 MJ 139 (CMA 1975) (warrant officers and lieutenants excluded); *United States v. Greene*, 210 USCMA 232, 43 CMR 72 (1970) (court membership limited to senior officers). Where systematic exclusion is consistent with Article 25, it may be permissible. *See United States v. Yager*, 7 MJ 171 (systematic exclusion of personnel below pay grade E-3 permissible because those grades are unlikely to meet requirements of Article 25). Appellant has presented no evidence that court members were either added or excluded for reasons that violate the Constitution or Article 25.

On the record before us, we hold that appellant has failed to make a *prima facie* showing of noncompliance with Article 25 or the systematic exclusion of otherwise qualified court members based on race or gender. Among the officer population, he has not shown how many blacks or females were eligible and available, or that any eligible black or female officers were excluded from consideration. Among the enlisted population, the evidence produced by the defense showed that black and female soldiers were selected in numbers greater than their proportionate share of the eligible population. Since appellant failed to make a *prima facie* showing that blacks and females were improperly excluded from participation in his court-martial, the military judge properly rejected appellant's challenge to the process by which his court-martial was convened.

**ISSUE XXXIII**

**WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS,**



**AND ARTICLE 55, UCMJ, BECAUSE HE WAS TRIED IN A PEACETIME CAPITAL CASE BY A COURT-MARTIAL PANEL (I.E. JURY) COMPOSED OF LESS THAN TWELVE MEMBERS.**

This issue was resolved against appellant in *United States v. Curtis*, 32 MJ at 267-68.

**ISSUE XXXIV**

**WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN HE RULED THAT THE SPECIFICATIONS TO BOTH ROBBERY CHARGES COULD BE AMENDED AFTER ARRAIGNMENT WHEN THE EVIDENCE CLEARLY SHOWED THAT THE MODIFICATIONS CHANGED ESSENTIAL PORTIONS OF THE ELEMENTS TO THE OFFENSES AND THEREBY CONSTITUTED MAJOR CHANGES DEMANDING DISMISSAL OF THE CHARGES.**

112. As originally drafted, specifications 1-3 of Charge III alleged that the money taken from the three cab drivers was the property of the individual drivers "and the Kelly Taxi Cab Company." After arraignment but before entry of pleas, trial counsel learned that the cab drivers worked for Yellow Cab Company, even though they drove Kelly cabs. Over defense objection, trial counsel amended the specifications to allege that the money was taken from the three individual cab drivers "and the Yellow Cab Company." Although defense argued that the change was major, the military judge ruled that it was not.

Minor changes may be made after arraignment; major changes may not be made without preferring charges anew. RCM 603(c) and (d). RCM 603(a) provides, "Minor changes in charges and specifications are any except those which add a party, offenses.

or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged."

We hold that the changes were "minor." Pleading the name of the individual cab drivers' employers was unnecessary in this case; pleading the names of the individual drivers would have been sufficient. The focus of the case was on the individual drivers, not their employer. There is no possibility that appellant was misled.

**ISSUE XXXV**

**WHETHER THE COURT-MARTIAL LACKED JURISDICTION TO TRY APPELLANT BECAUSE THE PRETRIAL ADVICE WAS INITIALLY DEFECTIVE AND THEN CURED BY A NEW PRETRIAL ADVICE WITHOUT REREFERRAL OF CHARGES.**

113. On January 23, 1989, the staff judge advocate (SJA) prepared his pretrial advice to the convening authority as required by Article 34, UCMJ, 10 USC § 834. The case abstract attached to that advice contained several mistakes: it listed appellant's age as "0"; it indicated that he was "restricted" when in fact he was in pretrial confinement; and it omitted appellant's service awards.

On February 9, 1989, appellant asked the military judge to order a new pretrial advice. After trial counsel advised the military judge that the SJA intended to correct his pretrial advice, add a memorandum expressing appellant's concerns about the pretrial advice, and determine whether the convening authority desired to adhere to his previous decision, a corrected and expanded pretrial advice was submitted to the convening authority on February 14, 1989. In addition to correcting the errors in the original advice, the SJA identified which offenses were capital and advised the convening authority of the mitigating factors



which appellant desired him to consider. The convening authority adhered to his previous decision to refer the charges to a general court-martial as a capital case.

Article 34(a) mandates, "Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice." The SJA must state "in writing" whether each "specification is warranted by the evidence," and whether "a court-martial would have jurisdiction over the accused and the offense," and must recommend the action to be taken. *See* RCM 406. The SJA need not set out his legal "analysis or rationale." There is no legal requirement to summarize the evidence, discuss aggravating or mitigating factors, or list the recommendations of subordinate commanders. RCM 406, Discussion. Defects in the pretrial advice are not jurisdictional, but are tested for prejudice. Art. 59(a), UCMJ, 10 USC § 859(a); *United States v. Murray*, 25 MJ 445, 447 (CMA 1988).

We hold that the factual errors in the original pretrial advice were not jurisdictional, were corrected by the supplemental advice, and were not prejudicial to appellant.

**ISSUES XXXVI AND XXXVII**

**WHETHER THE STAFF JUDGE ADVOCATE WAS DISQUALIFIED FROM PARTICIPATING IN THE PROCEEDINGS AFTER THE INITIAL PRETRIAL ADVICE WAS CHALLENGED AS DEFECTIVE.**

**WHETHER THE CONVENING AUTHORITY WAS DISQUALIFIED FROM PARTICIPATING IN THE PROCEEDINGS AFTER THE INITIAL PRETRIAL ADVICE AND CAPITAL REFERRAL WERE CHALLENGED AS DEFECTIVE.**

114. Appellant contends that because the SJA's pretrial advice and the convening authority's action based on that advice

were challenged at trial, based on the mistaken entries in the pretrial advice discussed in Issue XXXV, *supra* at 288, both the SJA and the convening authority were disqualified. We hold that neither officer was disqualified.

Neither the SJA nor the convening authority was placed in the position of weighing their own credibility or resolving an issue regarding the correctness of their decisions. The SJA recognized that his original advice contained factual errors and he corrected those errors without being ordered to do so by the military judge. Thus, there were no legal or factual issues to be resolved. Accordingly, neither the SJA nor the convening authority was disqualified. *See United States v. Choice*, 23 USCMA 329, 331, 49 CMR 663, 665 (1975).

**ISSUE XXXVIII**

**WHETHER THE RECORD OF TRIAL MUST BE RETURNED TO THE CONVENING AUTHORITY FOR NEW RECOMMENDATION AND ACTION BECAUSE A SUBSTANTIAL PORTION OF THE FINDINGS INSTRUCTION WAS NOT AUTHENTICATED UNTIL MORE THAN TWO YEARS AFTER THE CONVENING AUTHORITY'S ACTION.**

115. The record of trial was authenticated by Judge Saynisch on June 5, 1989. A member of the defense team, Captain Smart, acknowledged on June 6 that he had examined the record of trial. A copy of the SJA's post-trial recommendation was served on CPT Ibbotson, lead defense counsel on June 6. On June 19, CPT Ibbotson certified that he had read the post-trial recommendation and the authenticated record of trial, and he submitted matters for consideration by the convening authority in accordance with RCM 1105 and 1106. He did not challenge the accuracy or completeness of the record.



On November 15, 1991, the Clerk of the Court, U.S. Army Court of Military Review, pointed out in a letter to the convening authority that page 1500 was missing from the record and requested the convening authority to correct the record. Judge Saynisch executed a certificate of correction which transcribed and inserted the contents of the missing page. Page 1500 was one of 38 pages of instructions on findings and contained some of the procedural instructions for deliberation and voting. Appellant now argues that the convening authority's action was based on an unauthenticated record and was therefore invalid. He cites an opinion of the Court of Military Review, *United States v. Batiste*, 35 MJ 742, 744 (ACMR 1992), in which "the substantive proceedings in their entirety" (guilty plea inquiry, findings, sentence hearing, and sentence) were not properly authenticated.

We hold that a new recommendation and action are not required. We regard the omission in this case as more akin to the minor omission in *United States v. Martinez*, 27 MJ 730 (ACMR 1988), rather than to the failure to authenticate most of the record, as occurred in *Batiste*. The initial record of trial in appellant's case was properly authenticated, and the certificate of correction was properly authenticated. RCM 1104(d)(1) authorizes the return of an incorrect or incomplete record to the convening authority for correction. RCM 1104(d)(2) authorizes the military to execute a certificate of correction.

"The convening authority is not required to review the [record] for legal . . . or factual sufficiency." RCM 1107(b)(1); *see* RCM 1107(c), Discussion. Defense counsel did not challenge the completeness of the record after examining it and did not contest the legal sufficiency of the instructions contained on the then-missing page. There is no reasonable possibility that that missing page affected the convening authority's decision. Accordingly, there is no reasonable possibility of prejudice. Art. 59(a).

**ISSUE XXXIX**

**WHETHER THE ARMY COURT OF MILITARY REVIEW ABUSED ITS DISCRETION BY REFUSING TO SIT *EN BANC* IN APPELLANT'S CASE.**

116. Appellant's conviction and sentence were affirmed by the Court of Military Review on February 3, 1992. 34 MJ 956. On February 24 appellant filed a petition for reconsideration and suggestion for reconsideration *en banc*. On March 3, 1992, the suggestion was not adopted, and the petition was denied on April 15, 1992. 34 MJ 1065, 1066. Appellant now asserts that the Court of Military Review abused its discretion by refusing to hear his case *en banc*.

Article 66(a), UCMJ, 10 USC § 866(a), provides that a Court of Military Review "may sit in panels or as a whole in accordance with rules prescribed under subsection (f)," and that "[a]ny decision of a panel may be reconsidered by the court sitting as a whole." In accordance with subsection (f) the Judge Advocate General of all services have promulgated Joint Rules of Practice and Procedure. Courts of Military Review, Rules of Practice and Procedure, March 1, 1985. *See* 22 MJ CXXVII. Rule 17(a) of those Rules provides as follows:

> A majority of the judges present for duty may order that any appeal or other proceeding be considered or reconsidered, except as indicated in section (c) below, by the Court sitting as a whole. Such consideration or reconsideration ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of decision, or (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed pursuant to Article 66 extends to death.

22 MJ at CXXXIII.



Appellant argues that he has been denied equal treatment because earlier capital cases were heard *en banc* but his was not. We find this "me, too" argument unpersuasive. The Joint Rules clearly contemplate that reconsideration is discretionary, not mandatory, and that reconsideration *en banc* is the exception rather than the rule.

117. At the time appellant filed his suggestion for reconsideration *en banc*, the Army Court of Military Review had already addressed many significant constitutional issues involved in capital cases in *United States v. Murphy*, 30 MJ 1040 (ACMR 1990) (en banc), *remanded*, 36 MJ 8 (CMA 1992), *record returned for mandatory review*, 38 MJ 184 (1993); *United States v. Dock*, 26 MJ 620 (ACMR 1988) (en banc); and *United States v. Matthews*, 13 MJ 501 (ACMR 1982) (en banc). The Army court also had the benefit of the Navy-Marine Corps Court of Military Review's wisdom in *United States v. Curtis*, 28 MJ 1074 (1989) (en banc), as well as the guidance from this Court in *United States v. Curtis*, 33 MJ 101; *United States v. Curtis*, 32 MJ 252; *United States v. Dock*, 28 MJ 117 (CMA 1989), *decision on further review*, 40 MJ 112 (CMA 1994); and *United States v. Matthews*, 16 MJ 354 (CMA 1983). We hold that the Court of Military Review did not abuse its discretion by not adopting the suggestion for reconsideration *en banc*.

**ISSUE XL**

**WHETHER THE ARMY COURTS PROPORTIONALITY REVIEW IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW.**

118. Appellant contends that the proportionality review by the court below in this case was flawed because it "fails to give any indication as to what criteria were examined or how those criteria were weighed." Final Brief at 374. Appellant argues that this Court should set up proportionality standards of review simi-

lar to those adopted by New Jersey. Final Brief at 375-79. Lastly, appellant conducts his own proportionality review, using military "death-eligible" cases tried within 3 years of appellant's case and asserts that appellant's sentence is disproportionate. Final Brief at 379-83.

The Supreme Court has held that a proportionality review is not required by the Eighth Amendment if the sentencing procedure sufficiently narrows the class of individuals subject to the death penalty. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In *United States v. Curtis*, 32 MJ 252, 270-71 (CMA 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991), this Court held that proportionality review is not required by the Constitution but is required by Article 66(c). *But see United States v. Murphy*, 36 MJ 8, 9 (CMA 1992) (Crawford, J., dissenting). During our second review of *Curtis*, we gave the following general guidance: "[I]t would be fitting for the Court of Military Review to consider generally similar cases reviewed by the Supreme Court of the United States in which state courts have imposed the death penalty for like crimes on that basis." *United States v. Curtis*, 33 MJ at 109.

In appellant's case the Court of Military Review followed our *Curtis* guidance and used a computer search to examine cases reviewed by the Supreme Court since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), concluding "that the sentence is generally proportional to those imposed by other jurisdictions in similar situations." 34 MJ at 969. The Court of Military Review specifically relied on five cases involving murder for pecuniary gain: *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (robbery and murder of 7-Eleven store clerk); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (defendant robbed and murdered victim by shooting him in the head); *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (defendant robbed and killed a pizza delivery man); *Blystone v.*



*Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (defendant robbed and killed a hitchhiker); and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (murder in the course of a burglary).

119. We hold that the proportionality review conducted by the Court of Military Review complies with Article 66 and our guidance in *Curtis*.

**ISSUE XLI**

WHETHER THE MILITARY DEATH PENALTY SCHEME IS INVALID DUE TO *FURMAN V. GEORGIA*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) AND THE SEPARATION OF POWERS DOCTRINE.

The issue was resolved against appellant in *United States v. Curtis*, 32 MJ at 260-67.

**ISSUE XLII**

WHETHER THE DEATH PENALTY SENTENCING STANDARD REQUIRING AGGRAVATING FACTORS TO "SUBSTANTIALLY OUTWEIGH" EXTENUATING AND MITIGATION (SIC) CIRCUMSTANCES IS IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN THAT THE ONLY ACCEPTABLE STANDARD MUST BE "BEYOND A REASONABLE DOUBT." SEE ALSO ARTICLE 59(a), UCMJ.

We resolve this issue against appellant for the reasons set out in our resolution of Issue XIX, *supra*. *See Zant v. Stephens*, 462 U.S. 862, 875 and n. 13, 103 S.Ct. 2733, 2742 and n. 13, 77 L.Ed.2d 235 (1983) (specific standards for balancing aggravating against mitigating circumstances not constitutionally required).

**ISSUE XLIII**

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE MEMBERS ON SENTENCING AS TO THE TERM "SUBSTANTIALLY OUTWEIGHED" WITH REGARD TO THE RELATIONSHIP OF MITIGATING CIRCUMSTANCES TO AGGRAVATING FACTORS.

We resolve this issue against appellant for the reasons set out in our resolution of Issues XIX and XLII, *supra* 41 MJ at 276 and 291.

**ISSUE XLIV**

WHETHER ARTICLE 18, UCMJ, 10 USC § 818 AND RCM 201(F)(1)(C), WHICH REQUIRE TRIAL BY MEMBERS IN A CAPITAL CASE, VIOLATE THE FIFTH AND EIGHTH AMENDMENT GUARANTEES OF DUE PROCESS AND A RELIABLE VERDICT.

We resolve this issue against appellant for the reasons set out in *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965), and *United States v. Matthews*, 16 MJ at 363.

**ISSUE XLV**

APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAW REGARDING APPOINTMENT OF LEAD APPELLATE DEFENSE COUNSEL.

120. Appellant contends that he has been denied equal protection of the law because "[t]he U.S. Army is the only branch of the armed forces that makes no concrete distinction in case assignments between appellate counsel assigned to death-penalty cases and counsel assigned to other cases." Appellant argues that he has been treated unfairly because other services provide appellate counsel for death penalty cases in the grade of major or lieutenant commander and reduce their workload.



We reject appellant's argument for the reasons set out by the court below. 34 MJ at 1066-67. In addition we note that the breadth and depth of the issues raised, briefed, and argued before this Court reflect a level of representation far above the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984). We note further that appellant's complaints about the military grade of his appellate counsel are belied by the signature blocks on his brief before this Court, which reflect his representation by a lieutenant colonel, a major, and two captains, and the signature blocks on his brief before the court below, which reflects representation by a colonel and two captains.

**ISSUE XLVI**

WHETHER THE GOVERNMENT'S ATTEMPT TO RECONSTRUCT DEFENSE COUNSEL'S OPENING STATEMENT REGARDING PRESENTENCING (APP. EXH. CL) DUE TO THE COURT REPORTER'S FAILURE TO RETURN FROM A RECESS BEFORE THE COURT RECONVENED WAS INSUFFICIENT TO SATISFY THE REQUIREMENT THAT THE RECORD BE VERBATIM.

We resolve this issue against appellant for the reasons set out by the court below. 34 MJ at 966-67.

**ISSUE XLVII**

WHETHER THE MILITARY JUDGE IMPROPERLY DENIED A DEFENSE MOTION TO HAVE

THE MEMBERS IGNORE A PORTION OF THE GOVERNMENT'S SENTENCING ARGUMENT REQUESTING THAT THE MEMBERS VINDICATE SOCIETY'S VICTIMS.

Trial counsel argued during presentencing that "Americans, members of society, need to know that they will be protected and that we will protect and we will vindicate society's victims." Defense counsel objected to the reference to vindicating victims. The military judge overruled the objection.

We hold that the military judge correctly overruled the objection. The thrust of the defnse argument was that general deterrence is irrelevant in a capital context. However, this Court has held that general detrerence is a relevant factor in sentencing. *United States v. Lania,* 9 MJ 100 (CMA 1980). To the extent that the argument also invoked retribution and vindication of wrongs, we hold that the argument was proper. *See Gregg v. Georgia,* 428 U.S. 153, 183-84, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (retribution and vindication of wrongs are permissible sentencing objectives).

**ISSUE XLVIII**

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING TRIAL COUNSEL TO QUESTION WITNESSES REGARDING APPELLANT'S REMORSE OR LACK THEREOF AND ARGUE THAT APPELLANT LACKED REMORSE AND COMPOUNDED THE ERROR BY INSTRUCTING THAT LACK OF REMORSE COULD BE CONSIDERED AS AN AGGRAVATING FACTOR. *CF. UNITED STATES V. EDWARDS,* 35 MJ 351 (CMA 1992); *LESKO V. LEHMAN,* 925 F.2d 1527 (3d Cir.), *CERT. DENIED,*__ U.S. __, 112 S.Ct. 273, 116 L.Ed.2d 226 (1991).



121. Contrary to the suggestion, implied through the citations in the assignment of error, trial counsel did not expressly or impliedly comment on appellant's silence at trial. The propriety of trial counsel's presentation of evidence regarding appellant's lack of remorse is resolved in our discussion of Issue III, subissue I, *supra* at 250 and Issue IV, subissue H, *supra* at 259.

**ISSUE XLIX**

WHETHER APPELLANT WAS DENIED THE POTENTIAL MITIGATION THAT A GUILTY PLEA WOULD HAVE AFFORDED HIM.

This issue was resolved against appellant in *United States v. Dock,* 28 MJ 117, and *United States v. Matthews,* 16 MJ 354.

**ISSUE L**

WHETHER THE PRESIDENT EXCEEDED HIS AUTHORITY UNDER THE CONSTITUTION AND ARTICLE 36, UCMJ, IN PROMULGATING RULE FOR COURTS-MARTIAL 1004.

This issue was resolved against appellant in *United States v. Curtis,* 32 MJ 252, and *United States v. Matthews,* 16 MJ 354.

**ISSUE LI**

WHETHER THE DEATH PENALTY PROVISION OF ARTICLE 118, UCMJ, IS UNCONSTITUTIONAL AS IT RELATED TO TRADITIONAL COMMON LAW CRIMES THAT OCCUR IN THE UNITED STATES IN TIME OF PEACE.

We resolve this issue against appellant for the reasons stated in the decision of the court below. 34 MJ at 967. *See United States v. Schafer,* 13 USCMA 83, 85-86, 32 CMR 83, 85-86 (1962).

**ISSUE LII**

WHETHER ARTICLE 118 FAILS TO COMPLY WITH THE REQUIREMENTS OF *FURMAN V. GEORGIA*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), IN THAT CONGRESS HAS NOT ENACTED ANY CHANGE TO ARTICLE 118, UCMJ, WHICH WOULD SUFFICIENTLY NARROW THAT CLASS OF INDIVIDUALS THAT WARRANT A DEATH SENTENCE.

122. We resolve this issue on the basis of our decisions in *United States v. Matthews*, 16 MJ 354, and *United States v. Curtis*, 32 MJ 252. In *Matthews*, we held that either the President or Congress could remedy the defects in military capital sentencing procedures. 16 MJ at 380. In *Curtis* we examined the procedures promulgated by the President in RCM 1004 and found them consistent with the Eighth Amendment. 32 MJ at 257-69.

**ISSUE LIII**

WHETHER APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE CAPITAL REFERRAL SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER VIOLATING THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Appellant argues that the capital referral system is arbitrary and capricious because each convening authority has absolute discretion to refer a case as capital or non-capital if the case involves an offense for which death is an authorized punishment. We resolve this issue against appellant for the reasons set out by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct.



2909, 49 L.Ed.2d 859 (1976). Referring to prosecutorial discretion to seek the death penalty or to plea bargain, the Supreme Court stated:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularlized circumstances of the crime and the defendant.

428 U.S. at 199, 96 S.Ct. at 2937. A convening authority exercises prosecutorial discretion by deciding, with the advice of his or her SJA, whether a case will be prosecuted and whether the death penalty will be authorized for a capital offense. *See United States v. Baker*, 14 MJ 361, 365 (CMA 1983) ("[T]he decision to prosecute . . . is made by a convening authority with advice from his staff judge advocate. . . ."), *overruled on other grounds*, *United States v. Teters*, 37 MJ 370, 376 (CMA 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 919, 127 L.Ed.2d 213 (1994). In the absence of evidence of arbitrary or discriminatory exercise of prosecutorial authority in this case, we hold that the Eighth Amendment was not violated by referring appellant's case as capital.

**ISSUE LIV**

WHETHER THE IMPOSITION OF THE DEATH PENALTY VIOLATED APPELLANT'S RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AMENDMENT BECAUSE RULE FOR COURTS-MARTIAL 1004 SUBJECTED APPELLANT, AS A MEMBER OF THE ARMED FORCES, TO A PENALTY WHICH IS NOT OTHERWISE AVAILABLE UNDER THE CRIMINAL CODE OF THE UNITED STATES FOR IDENTICAL CRIMINAL CONDUCT.

123. Appellant argues that congressional failure to amend the criminal code of the United States deprives him of equal protection because it subjects him to the death penalty solely because of his military status. We reject appellant's argument several reasons.

First, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), did not hold that the death penalty was unconstitutional, but only that the capital sentencing procedures violated the Eighth Amendment. Second, civilians are subject to the death sentence in state courts (such as those in Texas) if the state courts follow constitutionally acceptable procedures. Third, Congress authorized the death penalty for certain drug-related offenses, including murder, when it eanacted the Anti-Drug Abuse Act of 1988, Title VII, 102 Stat. 4387, 21 USC § 848(e). Accordingly, we hold that appellant has not been deprived of equal protection of the laws by virtue of his status as a member of the armed forces.

**ISSUE LV**

WHETHER THE AGGRAVATING FACTORS ENUMERATED IN RCM 1004(c)(7)(I) FAIL TO SUFFICIENTLY CLARIFY THE FACTORS INVOLVED OR NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THE RULE IS THEREFORE INVALID UNDER THE FIFTH AND EIGHTH AMENDMENTS.



We resolve this issue against appellant for the reasons set out in our decision in *United States v. Curtis*, 32 MJ at 260-67.

**ISSUE LVI**

WHETHER THE PEREMPTORY CHALLENGE PROCEDURE IN THE MILITARY JUSTICE SYSTEM, WHICH ALLOWS THE GOVERNMENT TO REMOVE ANY ONE JUROR WITHOUT CAUSE, CONSTITUTES AN UNCONSTITUTIONAL VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN CAPITAL CASES, WHERE THE PROSECUTOR IS FREE TO REMOVE A MEMBER WHOSE MORAL BIAS AGAINST THE DEATH PENALTY DOES NOT JUSTIFY A CHALLENGE FOR CAUSE.

We resolve this issue against appellant on both legal and factual grounds. RCM 912(g) specifically authorizes one peremptory challenge by the prosecution and one by the defense. The Supreme Court has refused to strike down the peremptory challenge process. *See Batson v. Kentucky*, 476 U.S. 79, 98-99, 106 S.Ct. 1712, 1724, 90 L.Ed.2d 69 (1986) ("While we recognize . . . that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice."); 476 U.S. at 107, 106 S.Ct. at 1729 (Marshall, J., concurring) ("I would not find [banning prosecution peremptories entirely] an acceptable solution."); 476 U.S. at 133, 106 S.Ct. at 1742 (Burger, C.J., dissenting). ("An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside. . . ");

476 U.S. at 137, 106 S.Ct. at 1744 (Rehnquist, J., dissenting) (peremptory challenge"has been described as "a necessary part of trial by jury' ").

124. As a matter of law, trial counsel would be entitled to challenge for cause a member who was likely, because of moral bias against the death penalty, to be unable "to give meaningful consideration to imposing a death penalty." *United States v. Curtis*, 33 MJ at 107, *citing Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); and *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). There is no legal impediment to trial counsel's challenging peremptorily a member who would be subject to challenge for cause.

Factually, appellant's contention is unsupported by the record. The prosecution exercised its peremptory challenge against Lieutenant Colonel Griffith, who indicated on *voir dire* that he could vote for the death penalty if the crime warranted it.

**ISSUE LVII**

WHETHER DUE PROCESS REQUIRES THAT TRIAL AND INTERMEDIATE APPELLATE JUDGES IN A PEACETIME MILITARY DEATH PENALTY CASE HAVE THE PROTECTION OF A FIXED TERM OF OFFICE.

We resolve this issue against appellant for the reasons set out in *United States v. Graf*, 35 M.J. 450 (CMA 1992), *cert. denied*, __ U.S. __, 114 S.Ct. 917, 127 L.Ed.2d 206 (1994).

**ISSUE LVIII**

WHETHER THE SYSTEM WHEREBY THE JUDGE ADVOCATE GENERAL OF THE ARMY APPOINTS TRIAL AND APPELLATE JUDGES TO SERVE AT HIS PLEASURE IS UNCONSTITU-



TIONAL AS IT VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. U.S. CONST. ART. II, § 2, ¶ 2, CL. 2; *FREYTAG V. COMMISSIONER OF INTERNAL REVENUE*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). *BUT SEE UNITED STATES V. WIESS*, 36 MJ 224 (CMA 1992).

This issue was resolved against appellant in *Weiss v. United States*, __ U.S. __, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994).

**ISSUE LIX**

WHETHER ARTICLE 142(B)(2)'S LIMITATION OF COURT OF MILITARY APPEALS JUDGES TO TERMS OF OFFICE OF FIFTEEN YEARS VIOLATES ARTICLE III, SECTION 1, U.S. CONSTITUTION, WHICH GUARANTEES LIFE TERM OF OFFICE TO JUDGES OF INFERIOR COURTS AS THE CONGRESS MAY ESTABLISH.

We resolve this issue against appellant for the reasons set out in *Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973), and *United States v. Matthews*, 16 MJ at 365.

**ISSUE LX**

WHETHER APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AMENDMENT IN THAT ALL CIVILIANS IN THE UNITED STATES ARE AFFORDED THE OPPORTUNITY TO HAVE THEIR CASES REVIEWED BY AN ARTICLE III COURT, BUT MEMBERS OF THE UNITED STATES MILITARY BY VIRTUE OF THEIR STATUS AS SERVICEMEMBERS ARE NOT.

125. We reject appellant's argument on several grounds. First, in *Palmore v. United States, supra,* the Supreme Court recognized the authority of Congress to provide for criminal trials and criminal appeals in the District of Columbia before judges of Article I courts who do not have life tenure and salary. Second, in *Palmore,* the Supreme Court also recognized that state court judges also do not enjoy life tenure and salary. Finally, this appellant is entitled under Article 67a, UCMJ, 10 USC § 867a, to seek review by an Article III court—the Supreme Court.

**ISSUE LXI**

WHETHER THIS COURT LACKS THE JURISDICTION AND THE AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF THE RULES FOR COURTS-MARTIAL AND THE UNIFORM CODE OF MILITARY JUSTICE BECAUSE THIS COURT IS AN ARTICLE I COURT, NOT AN ARTICLE III COURT WHICH HAS THE POWER OF CHECKING CONGRESS AND THE EXECUTIVE BRANCHES UNDER *MARBURY V. MADISON,* 5 U.S. (1 CRANCH) 137, 2 L.Ed. 60 (1803). *SEE ALSO COOPER V. AARON,* 358 U.S. 1, 18, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5 (1958) (THE POWER TO STRIKE DOWN UNCONSTITUTIONAL STATUTES OR EXECUTIVE ORDERS IS THE EXCLUSIVE CHECK OF THE ARTICLE III JUDICIARY.).

We resolved this issue against appellant in *United States v. Matthews,* 16 MJ at 364-68.

**ISSUE LXII**

WHETHER MILITARY DUE PROCESS AND FUNDAMENTAL NOTIONS OF FAIRNESS REQUIRE THAT EACH MEMBER OF THE COURT-MARTIAL SIGN HIS OR HER NAME TO THE DEATH-



SENTENCE WORKSHEET OR THAT THE CONDEMNED ACCUSED BE AFFORDED THE RIGHT AND OPPORTUNITY TO POLL THE MEMBERS. *SEE UNITED STATES V. CURTIS* (*CURTIS II*), 33 MJ at 110 (COX, J., CONCURRING). *BUT SEE* RCM 922(e).

RCM 922(e) prohibits polling members about their vote on fidings; RCM 1007(c) prohibits polling about the sentence. The drafters believed that polling would be contrary to Article 39(b), UCMJ, 10 USC § 839(b), and 51(a), UCMJ, 10 USC § 851(a), which protect the secrecy of deliberations and provide for voting by secret written ballot. Drafter's Analysis of RCM 922(e) and 1007(c), Manual, *supra* at A21-61 and A21-68.1 (Change 2). Where a less than unanimous vote is involved, we share the concerns of the drafters about potential command influence on junior members who would be compelled to reveal their votes if polling were permitted. Where the vote is unanimous, those concerns about command influence would appear to be unfounded.

In appellant's case, defense counsel did not ask to poll the members on either findings or sentence. Therefore, we hold that any issue regarding polling the members was waived.

**ISSUE LXIII**

WHETHER THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM DENIED APPEALLANT A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BY ALLOWING THE CONVENING AUTHORITY TO ACT AS A GRAND JURY IN REFERRING CRIMINAL CASES (CAPITAL CASES) TO TRIAL, PERSONALLY APPOINTING JURORS OF HIS CHOICE, HOLDING THE ULTIMATE LAW ENFORCEMENT FUNCTION

WITHIN HIS COMMAND, AND ACTING AS THE FIRST LEVEL OF APPEAL, THUS CREATING AN APPEARANCE OF IMPROPRIETY IN A PERCEPTION THAT HE ACTS AS PROSECUTOR, JUDGE, AND JURY. *SEE UNITED STATES V. JOBSON*, 31 MJ 117 (CMA 1990) (COURTS-MARTIAL SHOULD BE "FREE FROM SUBSTANTIAL DOUBT AS TO LEGALITY, FAIRNESS, AND IMPARTIALITY.").

126. Appellant makes a broad-based attack on virtually every aspect of the convening authority's role without briefing the issue. Final Brief at 423. We will briefly address each aspect of his attack.

### A. Grand Jury

The Fifth Amendment expressly excludes "cases arising in the land or naval forces" from the requirement for indictment by grand jury. Nevertheless, Article 32, UCMJ, 10 USC § 832, was intended to provide a substitute for the grand jury. In many respects, Article 32 confers rights on an accused which are denied a civilian before a grand jury. For example, an accused is entitled to appear at the Article 32 hearing, have appointed counsel, cross-examine the witnesses against him, examine the evidence against him, and present matters in defense, extenuation, or mitigation if he desires. See Art. 32(b); RCM 405(f). Contrary to appellant's assertion, the Article 32 investigating officer, not the convening authority, acts as a "grand jury."

### B. Appointment of Court Members

The convening authority appoints officers, and if requested by the accused, enlisted persons "who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperment." *See* RCM 502(a)(1); Art. 25(d)(2), UCMJ, 10 USC § 825(d)(2). As discussed in our resolution of Issues XXXI and XXXII, 41 MJ at 286, any attempts at court stacking are grounds for reversal of the conviction or sentence. Article 37(a) prohibits any attempts to influence the court members, and Article 98, UCMJ, 10 USC § 898, makes it a criminal offense to do so.



### C. Law Enforcement Authority

Although he or she is responsible as commander for maintaining discipline within the command, a convening authority who attempts to influence a court-martial is criminally liable, as noted above. In addition, any attempt to intimidate or dissuade witnesses from testifying, influence court members, influence the recommendations of subordinates regarding disposition of charges, or to chill a vigorous defense, will furnish grounds for reversal of the findings and sentence. *See, e.g., United States v. Thomas*, 22 MJ 388 (CMA 1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987).

### D. First Level of Appeal

127. The action of the convening authority is more accurately described as a review rather than an appeal. "The convening authority is not required to review a case for . . . legal sufficiency." RCM 1107(b). The process is a "one-way street" for an accused because the convening authority may set aside a conviction or reduce a sentence for any reason, but may not direct reconsideration of an acquittal or increase the sentence. Art. 60(e)(2), UCMJ, 10 USC § 860(e)(2) (1983); RCM 1107.

### E. Conclusion

The military justice system has withstood Constitution attack on several occasions, most recently in *Weiss v. United States*, __ U.S. __, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994), and *Solorio v.*

*United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987). Appellant has provided no legal basis for his broad based attack on the convening authority's role in the system, and we reject it for the reasons stated above.

**ISSUE LXIV**

WHETHER THE CAPITAL SENTENCING PROCEDURE IN THE MILITARY IS UNCONSTITUTIONAL BECAUSE THE MILITARY JUDGE DOES NOT HAVE THE POWER TO ADJUST OR SUSPEND A SENTENCE OF DEATH THAT IS IMPROPERLY IMPOSED.

We resolve this issue against appellant for the following reasons. First, although a military judge may not adjust or suspend a sentence, he may declare a mistrial under RCM 915. Second, the convening authority may set aside or reduce the sentence for any reason. RCM 1107(d)(1) and 1108(b). Third, the Court of Military Review, exercising its plenary *de novo* review authority pursuant to Article 66(c), may set aside an unlawful sentence or reduce a sentence it deems inappropriate. *See* RCM 1203.

**ISSUE LXV**

WHETHER COURT-MARTIAL ORDER NO. 19 IS DEFECTIVE IN THAT THE DATE FOR CHARGE II AND ITS SPECIFICATION (VIOLATION OF ARTICLE 80, UCMJ, 10 USC § 880 ATTEMPTED MURDER) IS INCORRECT AND SHOULD INSTEAD REFLECT 13 DECEMBER 1988 AS THE DATE OF THE OFFENSE, FOR MR. HARRISON DID NOT PICK UP APPELLANT AND MS. PESSINA FROM THE NUBIA TEMPLE UNTIL 1 A.M. ON THE 13TH (R. 929.)

We decline to act on this issue which asserts no legal error. *See* R. 1426.



**ISSUE LXVI**

WHETHER APPELLANT, AN INDIGENT ACCUSED, WAS DENIED EQUAL PROTECTION OF THE LAWS AND A FAIR TRIAL AS MANDATED BY THE FIFTH AMENDMENT WHEN HE WAS REFUSED AN EXPERT OF HIS OWN CHOOSING, DR. WISE, TO ASSIST HIM IN HIS DEFENSE FOR PURPOSES OF MEDICAL ANALYSIS, JURY SELECTION AND SENTENCING, WHILE THE GOVERNMENT WAS ABLE TO FORUM SHOP FOR ITS OWN FORENSIC EXPERTS THAT IT WANTED. *SEE AKE V. OKLAHOMA*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *GRIFFIN V. ILLINOIS*, 351 U.S. 12, 17-18, 76 S.Ct. 585, 589-90, 100 L.Ed. 891 (1956); *CALDWELL V. MISSISSIPPI*, 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 2637 n. 1, 86 L.Ed.2d 231 (1985); AND *WYGANT V. JACKSON BOARD OF EDUCATION*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986).

We resolve this issue against appellant for the reasons set out in our disposition of Issue II, *supra* at 239.

**ISSUE LXVII**

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE REFUSED TO ALLOW TRIAL DEFENSE COUNSEL TO STIPULATE TO THE ROBBERIES TO FORCE THE GOVERNMENT TO MAKE THEIR ELECTION PRETRIAL ON WHICH CHARGES THEY WOULD PRESENT TO THE PANEL. *SEE UNITED STATES V. DOCK*, 28 MJ 117, 118 (CMA 1989) (ACCEPTABLE PRACTICE IN CAPITAL CASE TO STIPULATE TO LESSER INCLUDED OFFENSES); *UNITED*

*STATES V. MOBLEY*, 28 MJ 1024 (AFCMR 1989), *REMANDED*, 31 MJ 273 (CMA 1990), *AFF'D*, 36 MJ 34 (CMA 1992).

128. Appellant suggested a stipulation to the robbery offenses, but trial counsel refused to stipulate. A stipulation may not be received unless all parties agree to its admission. RCM 811(c). Since trial counsel did not desire to stipulate, the military judge could not require him to do so. We hold that the military judge did not abuse his discretion.

**ISSUE LXVIII**

WHETHER THE SYSTEM OF APPOINTING CAPITAL DEFENSE COUNSEL IN THE MILITARY IS INADEQUATE TO SERVE THE NEEDS OF A DEATH SENTENCED ACCUSED SUCH AS APPELLANT IN THAT THE MILITARY SYSTEM CANNOT PROVIDE ADEQUATE CONTINUITY OF COUNSEL OR ENSURE CONFLICT FREE COUNSEL AS IS EVIDENCED IN THIS CASE.

In a broad-based attack on the manner in which military counsel are appointed for both trial and appeal, appellant asserts multiple problems relating to the workload and experience of counsel, continuity problems caused by reassignments and departures from active duty, and potential conflicts of interest.

Turning first to appellant's counsel at the court-martial, we held with respect to Issues II and III, *supra* at 239 and 241, that appellant was competently represented. With respect to the experience level of trial defense counsel, we note the recitals of each defense counsel on the record at the beginning of *voir dire*.

At the time of appellant's court-martial, Major Hayden, individual military counsel, had been on active duty as an officer over 12 years. He had been a lawyer for over 4 years, had spent 3 years as a prosecutor, had spent 1 year in graduate-level legal



education, and was currently serving as senior defense counsel at Fort Hood.

129. Captain Ibbotson had served "several years" as a field artillery officer, had previously served as a prosecutor at Fort Bragg, North Carolina, and was currently serving as the senior defense counsel for the 1st Cavalry Division at Fort Hood.

CPT Smart had engaged in the civilian practice of law, joined the Army Judge Advocate General's Corps in January, 1988, and had been serving as a defense counsel for about 8 months.

Turning to the appellate counsel in this case, we note that appellant was represented by four military counsel before the Court of Military Review, including Colonel Robert B. Kirby. 34 MJ at 958. COL Kirby had previous experience in appellate litigation of capital cases, having been one of the appellate counsel in *United States v. Murphy*, 30 MJ at 1045. Before this Court appellant was represented by four military counsel, including a major and a lieutenant colonel. *See* Issue XLV, *supra* at 291. We accept as common knowledge the fact that a lieutenant colonel in the Judge Advocate General's Corps will have been admitted to practice and have litigation experience in excess of the minimums prescribed by the ABA Guidelines. *See* Issue LXX, *supra* at 300.

To the extent that appellate counsel have lacked experience or suffered from lack of continuity, the impact has been on the efficiency of judicial administration rather than the quality of representation. Appellant's court-martial concluded on April 3, 1989. The case was argued before the Court of Military Review on December 9, 1991, and that Court issued its initial decision on February 3, 1992. 34 MJ 956. *See* decision denying petition for reconsideration on April 15, 1992. 34 MJ 1065. Oral argument before this Court was on September 30, 1993, almost 4½ years after the trial and almost 18 months since the final decision of the Court of Military Review.

130. Recognizing the potential inefficiencies noted above, both the court below and this Court have liberally granted ex-

tensions of time and allowed filing of supplemental pleadings and citations of authority even after oral argument. This Court has considered issues not raised before the court below. Although we have declined to apply the principle of *in favorem vitae* (Issue VI, *supra* at 266), we have accommodated counsel to the maximum extent possible to ensure that all issues are considered. Defense appellate counsel concede that their pleadings have been voluminous, with overlapping and redundant assignments of error. Final Brief at 436 n. 152. We are satisfied that every conceivable legal and factual issue has been raised and briefed.

Turning to appellant's argument regarding potential conflicts of interest, we note that appellant concedes that potential conflicts of interest by appellate counsel were resolved in his case before they ripened into actual conflicts of interest. Appellant has alleged no conflicts of interest among trial defense counsel, and we have found none. On the basis of the record before us, we hold that appellant has been afforded conflict-free counsel.

**ISSUE LXIX**

WHETHER APPELLATE DEFENSE COUNSEL AT THE ARMY COURT WERE INEFFECTIVE AND DENIED APPELLANT HIS RIGHT TO COMPETENT COUNSEL UNDER THE SIXTH AMENDMENT WHEN EACH FAILED TO DO AN ADEQUATE INVESTIGATION AND FAILED TO RAISE A GREAT NUMBER OF VIABLE ISSUES IN THIS CASE.

131. Appellate counsel raised this same issue unsuccessfully before the Court of Military Review. As they did before the court below, they have not identified in what particulars the investigation was inadequate or what additional issues should have been raised. Implied in this assertion is a claim that appellate counsel cannot, because of their inexpertise, identify what else they should have done.



We find this assertion of ineffectiveness unsupported by the record and the contrary well established. The purpose of appellate review is not to retry the case, but to review the trial for compliance with the law. Nevertheless, under the umbrella of an exhaustive assignment of errors, appellate counsel have virtually relitigated the entire case. As we noted in our discussion of Issue LXVIII, *supra* at 298, counsel have raised, albeit sometimes redundantly and sometimes belatedly, an exhaustive array of factual, evidentiary, procedural, and constitutional issues.

**ISSUE LXX**

WHETHER DUE PROCESS REQUIRES THAT THIS COURT ESTABLISH MINIMUM STANDARDS FOR TRIAL AND APPELLATE DEFENSE COUNSEL IN CAPITAL CASES.

Appellant advocates that this Court mandate compliance with the *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (ABA Guidelines) (Feb.1989). We decline to do so. Those Guidelines expressly provide "for such exceptions to the Guidelines as may be appropriate in the military." ABA Guidelines, Introduction at ii. The Guidelines further recognize that the limited resources and the general experience level of an office might require modification of the qualifications, stating as follows:

> For example, the resources and experience of the office might justify allowing an otherwise qualified attorney within that office to act as lead counsel after somewhat less than five years of personal litigation experience (Guideline 5.1.1.A(ii)) but could not justify allowing an attorney within that office to act as death penalty counsel after only minimal personal criminal litigation experience.

Commentary, Guideline 5.1 at 63. As we noted in our discussion of Issue LXVIII, *supra*, appellant was provided with two seasoned trial lawyers at his court-martial and several experienced appellate lawyers before the Court of Military Review and this Court.

132. Appellate defense counsel have repeatedly invited this Court to involve itself in the internal personnel management of the military services, and we have repeatedly declined the invitation. *See United States v. Weiss*, 36 MJ 224 (CMA 1992), *aff'd*, __ U.S. __, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) (appointment of military judges); *United States v. Graf*, 35 MJ 450 (CMA 1992), *cert. denied*, __ U.S. __, 114 S.Ct. 917, 127 L.Ed.2d 206 (1994) (*aff'd sub nom. Weiss v. United States*, __ U.S. at __-__, 114 S.Ct. at 760-63)) (terms of office for military judges); *United States v. Mitchell*, 39 MJ 131 (CMA), *cert. denied*, __ U.S. __, 115 S.Ct. 200, 130 L.Ed.2d 131 (1994) (officer-fitness reports for appellate military judges).

The Supreme Court has held that limited experience does not raise a presumption of ineffectiveness. *United States v. Cronic*, 466 U.S. 648, 665, 104 S.Ct. 2039, 2050, 80 L.Ed.2d 657 (1984). The quality of representation compelled by the Constitution is determined by reference to *Strickland v. Washington, supra*. In our resolution of Issues II and III, *supra* at 239 and 241, we have determined that the constitutional standard was met at the trial level in this case.

133. For the foregoing reasons, we decline to mandate minimum standards based on years of practice or numbers of cases tried. We hold that appellant was represented with a degree of competence well above the constitutional minimums at his court-martial, before the Court of Military Review, and before this Court. Accordingly, we further hold that appellant has not been denied due process by the absence of formal standards for trial and appellate defense counsel.



**DECISION**

The decision of the United States Army Court of Military Review (34 MJ 956, *recon. denied*, 34 MJ 1065) is affirmed.

Judges COX and CRAWFORD concur.

## APPENDIX

UNITED STATES )
)
vs )
) SENTENCE WORKSHEET
LOVING, DWIGHT J. )
PVI, US Army )
065-86-0228 )
B Btry, 1st Bn, 82nd FA )
1st Cavalry Division )
Fort Hood, Texas 76545-5130 )

### AGGRAVATING FACTORS

NOTE: If the court adjudges a death sentence, the President shall indicate which aggravating factor(s) have been proven, and strike out any not proven. If a death sentence is not adjudged, the aggravating factors portion of this document should be nullified by marking a large 'X' across it.

### PART A

### AGGRAVATING FACTORS

Private E-1 Dwight J. Loving, this court-martial unanimously finds, beyond a reasonable doubt, that the following aggravating factor(s) (has)(have) been proven:

| | YES | NO | |
|---|---|---|---|
| 1. | (X) | ( ) | The premeditated murder of Bobby Gene Sharbino was committed while the accused was engaged in the commission or attempted commission of a robbery. |
| 2. | (X) | ( ) | Having been found guilty of the felony murder of Christopher Fay as set forth in specification 3 of Charge I, the accused was the actual perpetrator of the killing. |
| 3. | (X) | ( ) | Having been found guilty of premeditated murder of Bobby Gene Sharbino, the accused was also found guilty of another violation of Article 118, UCMJ, in the same case. |

(If the court-martial fails to find unanimously that at least one of the aggravating factors exist, you may not adjudge a sentence of death.)



ATTACHED IS CXL







### PART B

### BALANCING OF AGGRAVATING AND MITIGATING FACTORS

Announce: The court-martial unanimously finds any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including the factor(s) found as indicated in PART A.

Yes X Now No _____

(If the court-martial fails to unanimously find that any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including the factor(s) found as indicated in PART A, then you may not adjudge a sentence of death.)

### PART C

### SENTENCE

NOTE: After the court has reached a sentence, the President shall circle the punishment(s) selected and accomplish any necessary filling in or crossing out within the punishment(s) selected.

Private E-1 Dwight J. Loving, this court-martial sentences you:

**FORFEITURES**

To forfeit $_____ pay per month for _____ months.

To forfeit all pay and allowances.

**CONFINEMENT**

To be confined for your natural life.

**PUNITIVE DISCHARGE**

To be discharged from the service with a (bad conduct discharge) (dishonorable discharge).

**DEATH**

To be put to death.

Note: A court-martial has no authority to suspend a sentence or any part of a sentence.

_____
(Signature of President)



BEST AVAILABLE COPY

SULLIVAN, Chief Judge (concurring in part and in the result):

134. I agree with the majority opinion on all of the issues in this case except Issues XXXI and XXXII. I concur, however, in the result on those issues. Before discussing them, however, I think some further comment on Issue I is warranted.

***ISSUE I***

WHETHER APPELLANT'S SENTENCE OF DEATH MUST BE SET ASIDE AND ONLY A LIFE SENTENCE AFFIRMED BECAUSE THE PANEL MEMBERS FOLLOWED IMPROPER VOTING PROCEDURES DURING THE SENTENCING DELIBERATIONS.

Appellant uses affidavits from three members of his court-martial to raise concern whether his panel disregarded the military judge's instructions for imposing a sentence. *See United States v. Bourchier,* 5 USCMA 15, 26-27, 17 CMR 15, 26-27 (1954); *United States v. Higdon,* 2 MJ 445, 455 (ACMR 1975). I note that several state courts have recently considered the propriety of raising such an issue by means of post-trial questioning of jurors and have resolved it against defendants, even in capital cases. *People v. Towns,* 157 Ill.2d 90, 191 Ill.Dec. 24, 35-36, 623 N.E.2d 269, 279-80 (1993); *Colvin-el v. State,* 332 Md. 144, 630 A.2d 725, 745 (1993); *Johnson v. State,* 593 So.2d 206, 210 (Fla. 1992); *People v. Morris,* 53 Cal.3d 152, 279 Cal.Rptr. 720, 807 P.2d 949, 997-98 (1991); *State v. Russell,* 733 P.2d 162, 164 (Utah 1987). While one of those jurisdictions might approve such a practice, even it recognizes that Fed.R.Evid. 606(b) does not allow impeachment of a verdict on this basis. *See People v. Perez,* 4 Cal.App. 4th 893, 908 n. 13, 6 Cal.Rptr.2d 141, 149 n. 13 (4th Dist. Div. 1 1992). As noted by the majority, Mil.R.Evid. 606(b), Manual for Courts-Martial, United States, 1984, is based on Fed.R.Evid. 606(b).



The critical question thus becomes whether these juror affidavits establish that influence of rank was employed in the deliberations to achieve imposition of the death sentence. *See* Mil.R.Evid. 606(b). I think not for several reasons. *First,* these affidavits were solicited by appellate defense counsel on the general procedures followed in deliberations. They were not instigated by any member complaining of unlawful influence of rank. *Second,* none of these affidavits expressly alleged unlawful influence of rank by the court-martial president. *Third,* despite Judge Wiss' argument to the contrary, none of the affidavits reasonably implied use of rank by the president to impose sentence-deliberation rules new or different from those given by the judge. In light of the role of the president of a court-martial, Judge Wiss' argument could be made in any case where a member says sentencing instructions were not followed in deliberations. The bottom line is that the Mil.R.Evid. 606(b) exception has not been shown to be applicable in this case.

***Issue XXXI***

The above issue states:

WHETHER THE CONVENING AUTHORITY WAS RACIALLY BIASED AGAINST APPELLANT AS SEEN BY HIS INSISTENCE ON HAVING RACIAL IDENTIFIERS IN THE JURY POOL SELECTION SHEETS, THE DISPROPORTIONATE PERCENTAGE OF BLACKS IN THE JURY POOL AS COMPARED TO THE POPULATION OF BLACKS AT FORT HOOD, AND THE ACTIONS TAKEN BY THE CONVENING AUTHORITY AFTER HE PICKED AN ALL WHITE JURY IN A BLACK-ON-WHITE CRIME WHERE APPELLANT IS BLACK.

***Appellant's Claim***

135. Appellant in his brief complains that the judge improperly ignored "the specter of racism" raised in this case with respect to the convening authority's selection of soldiers to sit as members of his court-martial. Final Brief at 336. He generally references the decision of this Court in *United States v. Smith*, 27 MJ 242 (1988). He then asks that this case be remanded for a hearing so the convening authority can explain his purpose in using racial identifiers in the member selection process. He again refers to decisions of this Court in *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967); *United States v. Moore*, 28 MJ 366 (1989); and *United States v. Santiago-Davila*, 26 MJ 380 (1988).

***Legal Nature of Appellant's Claim***

My starting point in addressing Issues XXXI is its particular wording. Unlike Issue XXXII, it does not assert that the convening authority purposefully excluded a cognizable group (blacks) from sitting on appellant's court-martial in violation of the Fifth and Sixth Amendments to the Constitution. Instead, it asserts that certain conduct by the convening authority evidenced racism on his part and appellant's brief further asserts that *the military judge erred by not calling him into court to provide an explanation for this conduct.* The asserted legal basis for this judicial error is our summary decisions on use of racial identifiers in the military justice system (*e.g., United States v. Brannon*, 33 MJ 179 (CMA 1991). *See generally United States v. Green*, 37 MJ 380 (CMA 1993)) and Supreme Court cases applying the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment's Equal Protection Clause to prohibit purposeful exclusion of minority persons from grand and petit juries. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct.



667, 98 L.Ed. 866 (1954). *See generally United States v. Greene*, 36 MJ 274 (CMA 1993)..

***Elements of Appellant's Claim***

136. Appellant cites no test from our case law which determines when a convening authority must be called as a witness to explain his member selection process and decisions. *Cf. United States v. Moore, supra* (trial counsel's use of peremptory challenges). Instead appellant heavily relies on the Supreme Court decision in *Hernandez v. Texas, supra*, to argue that the convening authority should have been called as a witness by the judge in this case. He asserts that *Hernandez* requires the prosecution to produce evidence providing a race-neutral explanation for jury selection procedures when a prima facie case of racial discrimination has been established. He further asserts that a *prima facie* case is made when

> *first*, . . . the accused is in a recognizable group, *second*, . . . there is statistical underrepresentation in the jury pool, and *third*, . . . this discrimination is due to either intentional acts or a system which is by its very nature susceptible to potential abuse by intentional acts. *See also Castaneda*, 430 U.S. at 494 [97 S.Ct. at 1280]; *Batson*, 476 U.S. at 79 [106 S.Ct. at 1713].

Final Brief at 333.

In this case, it was well established at trial that appellant was black and blacks are "a recognizable group" within the meaning of *Hernandez v. Texas* and *Castaneda v. Partida*, both *supra*. *See Batson v. Kentucky, supra; Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967). Accordingly, at issue, are the remaining two prongs of appellant's *Hernandez/Castaneda* test for establishing a *prima facie* case of purposeful discrimination under the Fifth Amendment. *See generally Ramseur v. Beyer*, 983 F.2d 1215, 1226-27 (3d Cir.1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2433, 124 L.Ed.2d 653 (1993)

***System Susceptible to Intentional Abuse***

137. The first question I will address is whether the convening authority's use of racial identifiers in the member selection process satisfied the third requirement of *Castaneda v. Partida, supra*. In other words, did evidence of that fact show a system susceptible to abuse by intentional acts of discrimination? As pointed out in the majority opinion (41 MJ at 285), the convening authority in the military justice system "is not required to be race-ignorant: he or she is only required to be race-neutral." *United States v. Green*, 37 MJ at 384. Former Chief Judge Everett in *United States v. Smith*, 27 MJ at 249, went further and opined for this Court that racial identifiers could be used by a convening authority to ensure that a "court-martial panel is representative of the military population." *See Ramseur v. Beyer*, 983 F.2d at 1228-29. Thus, the mere fact that racial identifiers were used by the convening authority or his subordinates in this unique military context did not itself show intentional discrimination. *United States v. Green*, 37 MJ at 384 ("The standards of proof and burdens of proof are set out in RCM 905(c)(1) and (2)."). *Cf. United States v. Greene*, 36 MJ at 278 (footnote omitted) ("principles of *Batson* apply to peremptory challenges . . . at courts-martial"). Nevertheless, use of racial identifiers on the jury pool selection sheets coupled with the broad discretion afforded a convening authoity in selecting court-martial panels clearly constitute a system which by its very nature is susceptible to abuse by intentional acts of discrimination. *See Castaneda v. Partida*, 430 U.S. at 497-98, 97 S.Ct. at 1281-82; *United States v. Smith*, 27 MJ at 249; *Ramseur v. Beyer*, 983 F.2d at 1227; *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 274, 116 L.Ed.2d 226 (1991).

***Substantial Underrepresentation***

138. The next question which I will address concerns the second prong of appellant's *Hernandez-Castaneda* test, *i.e.*,



whether a statistical underrepresentation was shown. Appellant in this issue asserts that "the disproportionate percentage of blacks in the jury pool as compared to the population of blacks at Fort Hood" indicates that the convening authority was racially biased. Final Brief at 332. His assigned issue, albeit indirectly, suggests that the relevant jury pool is the panel actually detailed by the convening authority to sit in this case, rather than the jury pool selection sheets from which this panel was taken.[1] In any event, appellant has not persuaded me that blacks were "substantially" underrepresented *either* in the jury pool selection sheets or in the panels actually detailed by the convening authority to sit in this case.

***Statistics***

As a starting point, I note that the convening authority issued four orders detailing members to appellant's court-martial. Court-Martial Convening Order (CMCO) 1 had 9 officers or 5 officers

[1] Appellant in his brief (at 334) suggests that the pool of members from which the all-white officer panel was designated by the convening authority was the 45 officers listed on the panel selection sheets submitted by the staff judge advocate to the convening authority. (R. 243) This so-called jury pool, as identified by appellant, has neither a statutory nor a regulatory origin. Pursuant to Article 25(a). Uniform Code of Military Justice, 10 USC § 825(a), all officers, commissioned and warrant, were eligible to serve on appellant's court-martial. Although the Staff Judge Advocate submitted a roster of 45 officers, the decision paper to the convening authority expressly informed the convening authority that he was not limited to the list and could designate any officer under his command in accordance with Article 25. As such, the "pool" of potential members could be the entire officer populations on Forts Hood and Sill. The officers detailed by the convening authority pursuant to written court-martial convening orders, RCM 504(d), Manual for Courts-Martial, United States, 1984, are equivalent to the civilian venire from which peremptory challenges and challenges for cause are made. A more appropriate statistical analysis would compare the percentage of black officers in the entire officer populations with the percentage of black officers detailed to serve on the court-martial.

and 4 enlisted members detailed, one of whom was black (11.1%). CMCO #4 was subsequently issued which had 12 officer members detailed, none of whom were black (0.0%). CMCO #7 had 7 officers and 6 enlisted members, 4 of the enlisted being black (30.8%). Finally, CMCO #8 detailed 12 officer members, 1 of whom was black (8.3%).

I also note that the record evidences several jury pool selection sheets used in this case. The selection sheets for CMCO #1 reflect 62 officers (13 blacks and 4 other) and 41 enlisted (13 blacks and 1 other). Appellate Exhibit (App. Ex.) LII at 9-15. The selection sheets for CMCO #4, composed only of officers, included 45 officers, 4 of whom were black (8.9%). App. Ex. XLI at 18-20. The selection sheets for CMCO #7 consisted of 282 enlisted persons and 45 officers, 327 persons total, 97 of whom were black (29.7%). App. Ex. XLVII at 3-14. Finally the selection sheets for CMCO #8, composed only of officers, was the same as that used for CMCO #4 (8.9% black). Defense statistics show that 37,998 officers and enlisted were at Fort Hood and 11,983 were black (31.5%). They also show that 425 of 2932 officers at Fort Hood were black (14.5%). App. Ex. XLI at 63.

***Analysis***

139. I find appellant's statistical arguments on Issue XXXI to be unpersuasive for several reasons. Initially, however, I must note that it is couched in terms of his purported Sixth Amendment right to a jury panel drawn from a representative cross-section of the population. However, as noted by former Chief Judge Everett, "No corresponding right exists ina court-martial; and, indeed, Article 25 of the Uniform Code of Military Justice, 10 USC § 825, contemplates that a court-martial panel will not be a representative cross-section of the military population." *United States v. Santiago-Davila*, 26 MJ at 389. I reject appellant's implied invitation to declare Article 25 unconstitutional.



In any event, this Court has held that a military accused does have a Fifth Amendment "equal protection right to be tried by a [panel] from which no 'cognizable racial group' has been [purposefully] excluded." 26 MJ at 389-90. *See United States v. Moore*, 28 MJ 366 (CMA 1989); *cf.: United States v. Smith*, 27 MJ at 249. Moreover, appellant has cited equal protection cases (applicable to the U.S. through the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)) at trial and on this appeal. *See Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954). Finally, the thrust of appellant's argument is that purposeful discrimination, not a denial of cross-representation, was evidenced in this case. In this regard, he asserts:

> The statistics show that anywhere from 15-30% of soldiers on Fort Hood were black (App. Exh. XLI), but the cross sectional pool from which the convening authority chose was only 9% black.

Final Brief at 334. Accordingly, I will construe appellant's statistical argument as a Fifth Amendment claim that the military judge erred by not requiring the convening authority to provide a race-neutral reasons for his apparent exclusion of blacks from his court-martial panel. *See Castaneda v. Partida, supra.*

140. To establish a *prima facie* case of "an equal protection violation" in a "jury selection process," a civilian accused must show *inter alia* that it

> (1) resulted in a *substantial* underrepresentation of a suspect class to which the accused belongs . . . ;

*United States v. Warren*, 16 F.3d 247, 252 (8th Cir.1994) (emphasis added), *citing Castaneda v. Partida*, 430 U.S. at 494, 97 S.Ct. at 1280; *see Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct.

667, 98 L.Ed. 866 (1954).[2] The burden to show a "substantial" underrepresentation is on the accused. *Whitus v. Georgia*, 385 U.S. at 550, 87 S.Ct. at 646; *United States v. Horne*, 4 F.3d 579, 588 (8th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1121, 127 L.Ed.2d 430 (1994). Here, appellant's own figures do not show a substantial disparity between the percentage of blacks eligible for duty on his court-martial and the percentage of blacks nominated for duty from which the convening authority detailed members to his court-martial or the percentage of blacks actually detailed by the convening authority. *Cf. Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 621, 88 L.Ed.2d 598 (1986) (appellant's own figures and analysis show exclusion not by chance).

In developing the "relevant statistical pool" for purposes of determining whether a substantial underrepresentation exists, consideration of the special skills or qualifications for service is required. *See generally Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553-55 (11th Cir.1994). In the present case, appellant generally compares the composition of jury pool selection sheets for his detailed panel to the percentage of black officer and enlisted soldiers at Fort Hood (9% black to 15-30% black). App. Ex. XLI at 63. Such a comparison, however, ignores the fact that appellant was tried by a panel of officers at his

[2] A question arises concerning the second prong of the *Hernandez/Castaneda* test after the decision of the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The *Castaneda* test requires a degree of underrepresentation "over a significant period of time," 430 U.S. 482, 494, 97 S.Ct. 1272, 1279, 1280, 51 L.Ed.2d 498 (1977), but *Batson* permits a showing of underrepresentation in defendant's case alone, 476 U.S. at 95-96, 106 S.Ct. at 1722-23. At least two circuits have expressly held that the *Castaneda* test has also been so modified. *Ramseur v. Beyer*, 983 F.2d 1215, 1226 (3d Cir. 1992); *Jefferson v. Morgan*, 962 F.2d 1185 (6th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 297, 121 L.Ed.2d 221 (1992); *cf. Dobbs v. Kemp*, 809 F.2d 750, 751 (11th Cir.), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987).



own request. Moreover, when he earlier requested trial by officer and enlisted members, additional jury pool selection sheets were utilized and a different detail of members made. Appellant's failure to shape his argument based on relevant and available eligible population figures seriously undermines its appeal. *United States ex rel. Barksdale v. Blackburn*, 639 F.2d 1115, 1123 (5th Cir.), *cert. denied*, 454 U.S. 1056, 102 S.Ct. 603, 70 L.Ed.2d 593 (1981); *see United States v. Douglas*, 837 F.Supp. 817, 823 n. 7 (n.D.Tex.1993); *Hillery v. Pulley*, 563 F.Supp. 1228, 1245 (E.D. Cal. 1983), *aff'd*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). *See also United States v. Greene*, 995 F.2d 793, 795 (8th Cir.1993).

141. In addition, review of the appropriate jury selection sheets used in the present case does not establish a *prima facie* case of purposeful exclusion of blacks as contended by appellant. *See also United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir.1989). Of the 62 officers considered for selection to CMCO #1, 13 were black (21%). Of the 103 officers and enlisted considered for selection on CMCO #1, 26 were black (25.2%). Of the 45 officers nominated for selection to CMCO #4 by the convening authority, 4 were black or approximately 9%. Under appellant's own figures, 15% of the total officers at Fort Hood were black. A 6% differential in terms of absolute disparity is not substantial underrepresentation as a matter of law. *United States v. Horne*, 4 F.3d at 588; *Floyd v. Garrison*, 996 F.2d 947, 950 (8th Cir.1993); *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir.1980). *See generally United States v. Irurita-Ramirez*, 838 F.Supp. 1385, 1389 (C.D. Cal. 1993). *Cf. United States v. Douglas*, 837 F.Supp. at 823. Of the 327 officers and enlisted nominated for selection on CMCO #7, 97 were black or 30%. In view of appellant's own figures, 31% of total officers and enlisted at Fort Hood were black. *See* 41 MJ at 305. A 1% underrepresentation occurred in absolute disparity terms. *See United States v. Pion*, 25 F.3d 18, 22-24 (1st Cir.), *cert.*

*denied*, __ U.S. __, 115 S.Ct. 326, 130 L.Ed.2d 286 (1994). Accordingly, appellant's argument is not supported by the jury pool selection sheets evidenced in this case. *See generally Ramseur v. Beyer*, 983 F.2d at 1232.

Also, a statistical review of the actual detail actions taken by the convening authority do not establish or support a *prima facie* case of purposeful discrimination in the member selection process in this case. *See Hillery v. Pulley*, 563 F.Supp. at 1246. Appellant suggests that appointment of 4 black enlisted members in CMCO #7 and 1 black officer in CMCO #8 was "mere tokenism" in light of his previously detailed all-white panel of CMCO #4. He offers evidence of the belatedness of these actions to buttress his statistical showing of the convening authority's intent to discriminate in his case. *Id.* at 1246-48. I find this showing inadequate to raise a *prima facie* case of intentional racial discrimination.

142. CMCO #8, the final detail order in this case, had approximately 9% black officers which substantially corresponds to the 15% of black officers at Fort Hood. CMCO #7, the preceding detail order containing officers and enlisted, had approximately 30% blacks which corresponds to the 31% blacks at Fort Hood. No *prima facie* case is shown by an absolute disparity of 6% or 1%. *See Floyd v. Garrison, supra.*

Admittedly, CMCO #4, the second detail order in this case, had 0% black officers and a 15% disparity has borderline significance to show intentional discrimination.[3] *Ramseur v. Beyer*, 983

[3] Appellant's arguments at trial and on appeal are based on "absolute disparity" analysis (the difference between the percentage of blacks detailed to his court-martial and the percentage of blacks in the Fort Hood population). *See United States v. Pion*, 25 F.3d 18, 23 n. 5 (1st Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 326, 130 L.Ed.2d 286 (1994); *United States v. Irurita-Ramirez*, 838 F.Supp 1385, 1389 (C.D.Cal. 1993). However, the gross statistics presented by appellant at trial were rudimentary at best. Moreover, appellant did not present expert testimony explaining the statistics. *See Hillery v. Pulley*, 563 F.Supp. 1228, 1241 (E.D.Cal. 1983), *aff'd*, 733 F.2d



F.2d at 1232. However, any implication of intentional discrimination resulting from statistical underrepresentation must be evaluated in light of circumstances of a particular case. *Id.* at 1233. Here, the final panels actually detailed to this case, CMCO #7 and CMCO #8, had no substantial underrepresentation of black officers or officers and enlisted. *Id.* at 1228. Moreover, the very evidence introduced by the defense to show underrepresentation provided a race-neutral reason for the convening authority's decision on CMCO #4 (to avoid having officers exposed to pretrial publicity). *Id.* at 1229. Finally, the record shows that the panels in CMCO #7 and #8 were detailed because of appellant's request for enlisted members (#7) and his later request to return to an all officer court panel after some officers

644 (9th Cir. 1984), *aff'd*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Even if this Court were to apply the statistical probability analysis used in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n. 17, 97 S.Ct. 1272, 1281 n. 17, 51 L.Ed.2d 498 (1977), appellant has not demonstrated substantial underrepresentation.

In *Castaneda*, the Supreme Court applied a statistical probability model to determine whether the underrepresentation was random. Essentially, "if the difference betwen the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." *Id.* at 497, 97 S.Ct. at 1282. In the case *sub judice*, applying the simple methodology used in *Castaneda*, the standard deviation is 1.2%. This figure is derived as follows: the square root of the product of the total number of officers in the sample (here 12) times the probability of selecting a black officer [(425 + 192)/(2932 + 1613) App. Ex. XLI at 63-64] (0.136) times the probability of selecting a non-black officer (0.864). *See* 430 U.S. at 497 n. 17, 97 S.Ct. at 1281 n. 17. The expected value of black officers among the 12 officers selected was approximately 2; the observed number was 1. The difference between the expected value of black officers designated to appellant's panel and the observed number of black officer designated to the panel was 1. This difference is less than two or three standard deviations and, therefore, is considered a statistically-random result. *Id.*

previously detailed became unavailable (#8). *See Ramseur v. Beyer, supra* at 1228. *Cf. Hillery v. Pulley, supra* at 1246-48.

The bottom line on this issue is that appellant did not meet his burden of estalbishing a *prima facie* case that the convening authority purposefully excluded blacks when he selected the panel members for his case. *See cf. Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); *Whitus v. Georiga,* 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967). Thus, the military judge did not err when he failed to call the convening authority to articular a race neutral reason for his selection decisions. *Cf. Batson v. Kentucky, supra; United States v. Moore,* 28 MJ at 369. Here, we can presume that the military judge knew that racial identifiers have been approved by our Court when used to insure a cross-representative panel for a military accused. *See United States v. Smith,* 27 MJ at 249. Moreover, appellant's statistical arguments are misleading on their face or fail on closer examination. Finally, it was conceded at trial that there was no proof that the convening authority had a history of purposeful discrimination in his court selection actions. (R. 258.) *See Ramseur v. Beyer, supra* at 1233. *Cf. Hillery v. Pulley, supra.* In this context, the military judge was not obliged by constitutional or military law to call the convening authority to explain his selection process and decisions.

***ISSUE XXXII***

WHETHER APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS BECAUSE THE PANEL MEMBER SELECTION POOL DID NOT INCLUDE ANY FEMALES.

143. On appeal before this Court, appellant argues that the convening authority in this case deliberately selected a panel without woman in violation of the Fifth and Sixth Amendments.



He asserts that 11% of the soldier population at Fort Hood were women; nevertheless, he notes that none of these women were in the selection pool sheets of officers from Fort Hood; no women were in the supplemental selection pool sheets from Fort Sill; only one woman was in the selection pool sheets for officers and enlisted from Fort Hood (App. Ex. XLVII); and no women were on his detailed panel (CMCO #8). He further asserts that stacking appellant's court-martial panel with males to achieve a particular result violates this Court's holding in *United States v. McClain,* 22 MJ 124 (1986).

Turning first to appellant's Sixth Amendment argument, I find it is unsupported as a matter of law. Appellant implies that Article 25(d) is unconstitutional and that a soldier is entitled to a representative cross-section of the population in the court-martial panel which tried him. This Court resolved this issue against appellant in *United States v. Smith,* 27 MJ at 248; and *United States v. Santiago-Davila,* 26 MJ at 389. *See also United States v. Moore,* 28 MJ at 367-68 n. 3. Accordingly, the mere fact that appellant's court-martial panel had no women on it did not establish a Sixth Amendment violation.

Turning to appellant's Fifth Amendment argument, I note that its attractiveness has increased since the recent decision of the Supreme Court in *J.E.B. v. Alabama ex rel T.B.,* __ U.S. __, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). *See also Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Moreover, here, the percentage of women in the officer population of Fort Hood and Fort Sill was approximately 11% as maintained by appellant. Also, the number of women detailed was 0, suggesting an absolute disparity of eleven. At trial, however, appellant mentioned the absence of women from CMCO #4 almost as an afterthought. (R. 243, 249, 259). He then questioned the presence of a woman on CMCO #7 (R. 260) and failed to make any objection whatsoever to CMCO #8 on this basis. (R.

333-34.) *See Ramseur v. Beyer,* 983 F.2d at 1229 n. 12. In this context, I would apply a plain error analysis to this question and resolve it against appellant.[4] *Id.* at 1232 n. 18. *See generally United States v. Chandler,* 12 F.3d 1427, 1431-32 (7th Cir.1994); *Dobbs v. Kemp,* 809 F.2d 750 (11th Cir.1987).

144. My final concern is appellant's argument based on *United States v. McClain,* 22 MJ 124. I agree with Judge Gierke that there is no evidence of court-packing in this case.

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[4] Appellant's argument on appeal is based on absolute disparity analysis (the difference between the percentage of women detailed to his court-martial and the percentage of women in the Fort Hood and Sill population). *See United States v. Pion,* 25 F.3d at 23 n. 5; *United States v. Irurita-Ramirez,* 838 F.Supp. at 1389. However, the statistics presented by appellant at trial were rudimentary, at best. Moreover, appellant did not present expert testimony explaining the statistics. *See Hillery v. Pulley,* 563 F.Supp. at 1241. If this Court were to apply the statistical probability analysis used in *Castaneda v. Partida,* 430 U.S. at 496-97 n. 17, 97 S.Ct. at 1281 n. 17, appellant has not demonstrated substantial underrepresentation.

In *Castaneda*, the Supreme Court applied a statistical probability model to determine whether the underrepresentation was random. Essentially, "if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." *Id.* at 497, 97 S.Ct. at 1282. In the case *sub judice*, applying the simple methodology used in *Castaneda*, the standard deviation is 1.1%. This figure is derived as follows: the square root of the product of the total number of officers in the sample (here 12) times the probability of selecting a female officer [312 + 169)/(2932 + 1612) App. Ex. XLI at 63-64] (0.106) times the probability of selecting a male officer (0.894). The expected value of female officers among the 12 officers selected was approximately 1; the observed number was 0. The difference between the expected value of female officers designated to appellant's panel and the observed number of female officer designated to the panel was 1. This difference is less than two or three standard deviations and, therefore, is considered a statistically-random result. *Id.*



***Conclusion***

Outside of the above reservations, I would affirm this case. Appellant received a fair trial and has been properly convicted. Under the Constitution and present laws of this land, I find that the death penalty has been properly adjudged and see no reason why appellant should not be executed for the crimes he commited.

I only add one further thought: my continuing concern that servicemembers be treated fairly in capital cases. As I stated in my concurring opinion in *United States v. Curtis, supra:*

> It is my personal view, however, that, in peacetime, a servicemember in a capital case should be tried by a 12-member court-martial. The value of a soldier's life is surely equal to the value of the life of his fellow citizens. *Cf. Williams v. Florida,* 399 U.S. 78, 103, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970). Nevertheless, neither the Constitution itself, nor Congress in legislation, nor the President by regulation has mandated a 12-member panel in a military capital case. *See generally* Van Loan, *The Jury, The Court-Martial,* and *The Constitution,* 57 Cornell L.Rev. 363, 384 n. 118 (1972). Moreover, it is the duty of this Court to apply the law of the land, not to legislate by judicial fiat, and therefore, it is beyond our power to mandate such a procedure. Finally, appellant himself, by use of his challenges, reduced in part the number of court members detailed to this case from 15 to 9. Moreover, he did not particularly object to trial by 9 members at this court-martial or request the detail of additional members. I could not find reversible error in these circumstances even if appellant was somehow entitled to a 12-member panel.

32 MJ at 271.

In the present case twelve members were detailed to sit in this case. Three members were challenged by the defense and one member was challenged by the prosecution. Appellant did not particularly object to trial by eight members or request detail of additional members. Thus, appellant was tried by that court-martial fairly and in accordance with the law. Its verdict must stand unless set aside by appropriate executive authority or by mandate of further judicial review.

WISS, Judge (dissenting):

145. I am not comfortable with the majority's treatment of several of the assigned issues; I believe that a more penetrating analysis would be helpful in some instances and that the discussion's focus is somewhat off the mark in others.

On three of the issues, however, I part company with the majority in two areas that relate to the bedrock for ensuring the fairness of a trial like this—a trial that ultimately may serve as the basis for executing this appellant: selection of and deliberations by court members. The first (Issue I—at 232) raises the cancerous possibility that command influence inside the members' deliberation room during their consideration of a sentence so skewed the legally required voting procedures that it undermined the fundamental fairness of those proceedings; two other issues raise the specter of the insidious possibility of racial (Issue XXXI) and gender (Issue XXXII), both at 283, discrimination infecting the convening authority's selection of the court-members who ultimately tried appellant.

The majority refuses to penetrate the protective curtain of the members' deliberations and, so, fails even to analyze much less redress the prejudice from the first flaw. As to the process by which the members who ultimately tried appellant were selected, the majority omits to consider all the facts of record surrounding that process and, so, does not recognize either the precise nature or quality of appellant's grievance.



146. As to each of these issues, therefore, I am compelled to dissent from the majority opinion. In addition, although my views of either of these matters would dispose of this appeal, I am pressed to pause and to offer substantially more comment than the majority does relating to two other issues of special importance in capital litigation: proportionality review (Issue XL—at 290) and continuity of appellate counsel (Issue LXVIII—at 298).

I

Any possibility of arbitrary imposition of rank in the military justice system—regardless of intent or motivation—that undercuts procedures that are crafted and structured to protect substantial rights of an accused must be rooted out and, if uncovered, purged. The majority consciously refuses to recognize that possibility in this case and, therefore, has covered its ears to appellant's complaint of it. I do not agree with the majority's view of the circumstances.

Accordingly, I conclude that appellant may have been denied the protections of the sentencing mechanism established by the President in RCM 1004 and 1006, Manual for Courts-Martial, United States, 1984, as well as due process in imposition of his sentence to death and his Eighth Amendment right to a reliable determination of a death sentence. I would order a limited hearing to gather all of the available evidence on the question so, on that basis, the Court could determine with confidence whether appellant's sentence was lawfully imposed.

A

147. "[T]he imposition of death by public authority is . . . profoundly different from all other penalties. . . ." *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). The heightened concern in a capital case derives from the finality of the result and the risk that the proceedings are vulnerable

to the influence of impermissible considerations. Because of this fundamental distinction between the death penalty and other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

"[T]he Eighth Amendment requires a different treatment of death-penalty cases." *United States v. Curtis,* 32 MJ 252, 255 (CMA), *cert. denied,* __ U.S. __, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991). Considerations of due process and the prohibition against cruel and unusual punishment require "fair procedure in the capital sentencing context." *Lankford v. Idaho,* 500 U.S. 110, 125, 111 S.Ct. 1723, 1732, 114 L.Ed.2d 173 (1991). One of the special requirements of the capital sentencing context is that the sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). *Accord Blystone v. Pennsylvania,* 494 U.S. 299, 308, 110 S.Ct. 1078, 1084, 108 L.Ed.2d 255 (1990) (fundamental principle of death-penalty jurisprudence that "the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet" "a required threshold below which the death penalty cannot be imposed," *quoting McCleskey v. Kemp,* 481 U.S. 279, 305, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987)). This narrowing process may be accomplished in the trial itself or in a sentencing scheme that relies on aggravating factors. *Lowenfield v. Phelps,* 484 U.S. 231, 244-46, 108 S.Ct. 546, 554-55, 98 L.Ed.2d 568 (1988); *Proffitt v. Florida,* 428 U.S. 242, 248-50, 96 S.Ct. 2960, 2965, 49 L.Ed.2d 913 (1976); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

148. This Court first considered whether the sentencing scheme for capital cases in the military justice system passed



constitutional muster in *United States v. Matthews,* 16 MJ 354 (1983). The Court concluded that, while the scheme did not reflect many of the then-apparent constitutionally required safeguards, one important omission was a "require[ment] that the court members make specific findings as to individualized aggravating circumstances—findings which can, in turn, be reviewed factually and legally." 16 MJ at 380. The Court suggested that either Congress or the President could lawfully remedy this defect. *Id.* at 380-81.

In response, the President promulgated a new death-penalty procedure by Executive Order No. 12,460, 49 Fed.Reg. 3169, in January 1984. That procedure became RCM 1004, Manual, *supra. United States v. Curtis,* 32 MJ at 257. *See also* Art. 106a(b) and (c), Uniform Code of Military Justice, 10 USC § 906a(b) and (c) (procedures required by Congress for imposition of death penalty for espionage in violation of Article 106a(a)).

Constitutional challenge to those procedures first arose in *United States v. Curtis,* 32 MJ 252. In the Court's opinion there, RCM 1004 was set out in full in order to plainly reveal the carefully interlocking structure of procedural safeguards that preserve a capital defendant's Fifth and Eighth Amendment rights. 32 MJ at 257-60. Making particular reference to the requirement that court "members must unanimously find at least one of the" delineated "aggravating factors" and to the requirement that the members must unanimously " 'concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances,' " *see* RCM 1004(b)(4)(C), 32 MJ at 268, the Court concluded that RCM 1004 "not only complies with due process requirements but also probably goes further than most state statutes in providing safeguards for the accused." 32 MJ at 269.

B

149. RCM 1004 (Change 2), together with RCM 1006, require the following orchestrated procedure of interrelated stepping stones toward a sentence of death:

* The accused must have been convicted of a death-authorized offense "by the concurrence of all the members of the court-martial present at the time the vote was taken." RCM 1004(a)(2).

* Ordinarily prior to arraignment, trial counsel must "give the defense written notice of which aggravating factors" listed in RCM 1004(c) "the prosecution intends to prove" as a means of narrowing the field of death-eligible accused. RCM 1004(b)(1).

* During presentence procedure, "[t]rial counsel may present evidence ... tending to establish one or more of the aggravating factors," and "[t]he accused shall be given broad latitude to present evidence in extenuation and mitigation." RCM 1004(b)(2) and (3).

* "Death may not be adjudged unless" all of the following are found by the court members based on evidence introduced either on the merits or during presentencing:

** "[A]t least one of the aggravating factors" listed elsewhere in the rule existed;

** "The required notice was given to the defense by trial counsel, and "all members concur in the finding with respect to" any given aggravating factor; and



** "All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances. . . ."

RCM 1004(b)(4) and (5).

* A vote on a proposed sentence that includes death may not occur until the members "vote by secret written ballot separately on each aggravating factor ... on which they have been instructed" and unless they unanimously agree beyond a reasonable doubt that a particular factor or factors exist in the case. RCM 1004(b)(7) and (c). Only if this threshold requirement is met is an accused death-eligible (that is, liable to imposition of the death penalty), and only then can the members proceed to deliberate and to vote on proposed sentences under the procedure applicable to all courts-martial that is set out in RCM 1006. RCM 1004(b)(7).

150. * During those deliberations, "[s]uperiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment." RCM 1006(a).

* During deliberations, "[a]ny member may propose a sentence. Each sentence shall be in writing and shall contain the complete sentence proposed. The junior member shall collect the proposed sentences and submit them to the president" of the court-martial. RCM 1006c.

* Voting is by secret written ballot. RCM 1006(d)(2).

*Voting is on "each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence

is adopted by the" necessary concurrence—in death, unanimous. RCM 1006(d)(3)(A) and (4)(A).

* The junior member of the court-martial collects and counts the votes, and the president checks the count and informs everyone else of the result. RCM 1006(d)(3)(B).

(This is not a quotation.)

Thus, compliance with RCM 1004 and 1006 attains two fundamental goals: First, it narrows the group of accused persons who can be death-eligible by requiring the members unanimously to find at least one specific aggravating factor and to find that the totality of aggravating circumstances substantially outweighs the extenuating and mitigating circumstances. Second, in consideration of what sentence should be adjudged, it implements procedures that maximize the unfettered and conscientious participation of each member in a manner that assures a moderating approach to the task and that assures that the weighty responsibilities inherent in this duty are not at all affected by differences in rank among the members.

C

151. Regrettably, the specter has been raised that this carefully designed structure of procedures broke down in this case—and critically, that it did so entirely because the superior-ranking member of the court unilaterally imposed his own short-cut toward a sentence rather than follow the clear path carefully mapped out for the court by the military judge.

As the majority opinion indicates, appellant has filed with this Court the post-trial affidavits of Colonel Ayler, who was the president of the court-martial, and Major Napoli and Captain Williams, who were two of the other members of the court-martial. I have attached all three affidavits as appendices to this opinion so that all may see exactly what these members say. *See* Appendices A, B, and C.



The majority opinion characterizes these affidavits as "ambiguous at best." 41 MJ at 235. I think they more accurately are ambiguous at *least*. All three purport to state the procedures that were followed during sentence deliberations and are in no way inconsistent with each other. Together, I believe that they, at minimum, *suggest* that the following occurred:

152. * The members did not vote at all during sentence deliberations on any of the aggravating factors relied upon by the prosecution to narrow the field of death-eligible accuseds. *See Lowenfield v. Phelps*, 484 U.S. at 244 [108 S.Ct. at 554]. Possibly, the president was content to skip that narrowing exercise and rely on the fact that they earlier had returned findings that reflected one or more such factors (*i.e.*, multiple murder, *see* RCM 1004(c)(7)(J)). RCM 1004 nowhere expressly contemplates this procedural merger of findings and sentencing votes; and the notion that the sentencing stage of a proceeding involves a deliberative process of factual and moral overtones and dynamics that is entirely distinct from the consideration of guilt would not seem to support the validity of this self-indulgence. *Cf. United States v. Shroeder*, 27 MJ 87, 90-91 (CMA 1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989). In any event, for whatever reason, this vote was not taken, as the military judge had directed them to do as part of the carefully interlocking procedural structure.

* There was no vote at all on whether the aggravating circumstances outweighed the extenuating and mitigating circumstances—at least, none of the three affidavits, which otherwise appear to fully set out the procedure that was followed, even mentions this critical step.

* Rather than the members formally writing proposed sentences in their entirety, the president had them proceed directly to a vote between the "two options" of life imprisonment and death. There is no mention of the remaining elements of the sentence at that point; and this method of choosing between the two statutorily authorized "options" theoretically begs the question whether any member would propose death under correct procedures.

* Rather then the junior member collecting and counting the ballots, the junior member instead merely passed the folded pieces of paper to the president, who himself unfolded and tallied them—another shortcut through the procedural checks in the rules. This first vote was 7 for death and 1 for life.

153. * Even if this first "vote" could somehow be constructed under the rules as a written proposal of sentences to be considered, the members did not then proceed, as required, to vote on the lightest sentence "option" first—life. *See United States v. Johnson*, 18 USCMA 436, 40 CMR 148 (1989); *United States v. Jackson*, 34 MJ 1145, 1149 (ACMR 1992); *see also United States v. Fisher*, 21 MJ 327 (CMA 1986) (failure to instruct members to vote on the proposed sentences "begining with the lightest"). Instead, they took a second vote between the "options" of life imprisonment and death, thereby making them equally available alternatives at that point in time. Where only one vote for life imprisonment is necessary to thwart a death sentence, the requirement for distinct votes—beginning with life, proceeding to death, then over again if the required concurrence is not mustered at any



point—cannot reasonably be seen as a mere technicality. Again there is no mention about consideration of the other elements of the sentence.

* As before, contrary to the military judge's instructions, the junior member merely collected and passed to the president the folded pieces of paper, who himself unfolded and counted them. He announced that, this time, the vote was all 8 for death, bad-conduct [sic] discharge, total forfeitures, and reduction to E-1.

(This is not a quotation.)

154. RCM 1004 and 1006 require a careful voting process: first, to determine if an accused is eligible for a death sentence (i.e. commission of a capital offense, presence of one aggravating factor, and aggravating circumstances); and, second to determine whether death is the appropriate sentence (after voting on and rejecting all lesser proposed sentences). These procedures are essential to ensure that the death penalty is not inflicted in an arbitrary and capricious manner.

As the earlier comparison graphically demonstrates, if the members actually trampled along the procedural shortcuts that are suggested by the affidavits, in the process they crushed the thoughtful and delicate balance in the procedural structure mandated by RCM 1004 and 1006. Moreover, if these shortcuts occurred, they occurred as a result of the unilateral imposition by the senior-ranking member of the court-martial of a procedure that differed markedly from the procedure that was plotted for the panel in the military judge's painstaking instructions.

Assuredly, the senior-ranking member of the court-martial has the responsibility to preside in the fullest sense. I do not quarrel with the majority that "Colonel Aylor was the president of the court-martial and, as such, had certain adminstrative duties and discretion in the performance of those duties." 41 MJ at 237.

*See United States v. Accordino*, 20 MJ 102, 105 (CMA 1985). It is not within his authority or discretion, however, to divine his own personally preferred procedural path toward a death sentence, in substantial disregard of the one that has been clearly prescribed by the President of the United States in the Manual for Courts-Martial and, in some instances, in substantial disregard as well of checkpoints along the way that are required by the Fifth and Eighth Amendments.

155. Unlawful command influence? I think so. These affidavits seem to suggest much more than what the majority concludes was "no more than Colonel Aylor's proper exercise of authority as president to preside over the deliberations." 41 MJ at 238. Instead, they seem to portray a scenario in which the senior-ranking member, solely by virtue of his rank, successfully imposed a procedure that was unlawful and that, in the process, destroyed the lawful procedural structure that would have substantially assured a fair and reliable sentence. By any definition, that scenario is unlawful command influence.[1] *Cf. United States*

[1] The majority contends that no issue of unlawful command influence is before this Court because "[t]here is absolutely no suggestion in the affidavits that Colonel Aylor exercised unlawful command influence." 41 MJ at 238. Defiantly denying the true color of the cloud created by these affidavits, however, does nothing to alter their dreary tone. To prove the point, I simply pose this question: Can it be more than rhetorical to ask whether anyone except the most senior ranking person on the court could have unilaterally imposed on all of the other, presumably intelligent, officer members a procedure of his own handiwork that was in marked deviation from that which clearly and in detail was prescribed by the military judge? I am not so naive as to believe that a second lieutenant (or a chief warrant officer 3, the rank of the junior member on appellant's panel) could have been so possessed of natural leadership that he so effectively could have led astray a whole panel of his colleagues. I am reminded of Justice Felix Frankfurter's admonition, "And there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801 (1949). Secure in the assumption that a junior-grade officer could not have accomplished what this colonel did, and in light of the fact that the procedure devised by Colonel Aylor in several important respects was at odds with the carefully crafted procedure mandated by the President of the United States, how can Colonel Aylor's role in this transgression be described as anything but "unlawful command influence"?

I am especially perplexed by the vote and separate comments of Chief Judge Sullivan on this issue. By himself, the Chief Judge merely seems to agree with the majority's view that these affidavits—which I believe raise the possibility that the influence of rank was used to implement unlawful procedures in lieu of those that were carefully constructed to protect an accused's substantive and procedural due process rights—simply does not present an issue of unlawful command influence. I confess, however, that I am unable to reconcile this view with the Chief Judge's separate opinion in *United States v. Greene*, 41 MJ 57, 59 (CMA 1994)—a case in which he forthrightly recognized that failure to follow important voting procedures in the deliberation room opens the door to unlawful command influence during those deliberations.



*v. Accordino*, *supra* at 104 ("use of rank by a court member to pervert military justice"); *United States v. Carr*, 18 MJ 297, 302 (CMA 1984) ("unlawful command influence" exception to Mil.R.Evid. 606(b), Manual, *supra*, includes allegation that court-martial's president used rank to pressure other members during deliberations).

The majority attempts to sidestep this command influence issue by stating, "Appellant has not alleged that Colonel Aylor exercised unlawful command influence during the deliberations." 41 MJ at 237. Although appellant did not make this claim in the brief, appellate defense counsel at oral argument repeatedly raised and argued the command influence issue. At the very outset of oral argument, counsel argued that the voting procedures were designed to prevent command influence and urged that the affidavits permit an inference of command influence. Again in rebuttal argument, appellate defense counsel explicitly asserted that the issue of command influence justified an evidentiary hearing. Accordingly, there can be no dispute that the command influence issue is squarely before this Court.

Nothing reeks like the odor of unlawful command influence; these affidavits have a distinctly disconcerting aroma emnating from them. I cannot legally or morally join in affirming this sentence to death without further proceedings to assure myself, appellant, and the community as a whole that appellant's substantial rights were not critically undermined by the unlawful exercise of the power of rank behind the closed doors of the members' deliberations. *See* Mil.R.Evid. 606(b).

II

156. Through Issues XXXI and XXXII, appellant pursues his trial assault on the court-martial panel-selection process that he complains resulted in African-Americans and women unlawfully being excluded initially and underrepresented ultimately on the panel that tried him. The majority opinion attempts to minimize the absence of both racial and sexual diversity in *one* officer panel that appellant objected to trying him. The majority relies on the post-objection attempts of the convening authority to provide for some diversity as sufficient damage control to moot this issue. I do not agree with the majority's casting of this issue, and I do not agree, either, with its conclusion that appellant has not carried the appropriate burden to trigger further inquiry.

A

Appellant is an African-American male who faced charges of murder, attempted murder, and robbery. His murder victims were two white males, and the victim of his attempted murder also was a white male; all of his alleged robbery victims were white males and females; and one of the important prosecution witnesses was a married white woman with whom appellant was involved in a sexual affair at the time of his crimes and upon whom appellant in his defense attempted to place a good deal of the onus for his actions.



157. Understandably, then, the defense team in this capital case had heightened sensitivity to any possible injection of racial discrimination into the proceedings. Certainly, a principle focus of this sensitivity, as well as to a somewhat lesser extent to gender discrimination,[2] related to the composition of the court-martial panel. In order to fully evaluate the legal issues inherent in appellant's complaint, a rather extensive recitation is necessary relating to the evolution of the panel that finally tried appellant.

***Court-Marial Convening Order Numbers 1 and 4***

The first panel of officers was selected under Court-Martial Convening Order (CMCO) #1, dated January 20, 1989. The senior member of this panel was African-American, and the rest were Caucasian; none was a woman. Appellate Exhibit (App. Ex.) LII at 9.

In a memorandum to the convening authority of February 14, the staff judge advocate (SJA) pointed to the substantial local publicity surrounding the offenses and the upcoming trial; "[i]n order to insure a completely fair and impartial court-martial panel," he recommended that the convening authority "detail, for this case only, a panel composed of soldiers who arrived at Fort Hood on or after 1 January 1989, or who are presently assigned to commands outside Fort Hood."

158. The SJA attached to his memorandum a list of officers nominated by the various commands at Fort Hood and officers made available from Fort Sill. Of the 45 officers on the list, 41 were white and 4 were African-American; none was female. The

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[2] Counsel's less-intensive focus on apparent unlawful exclusion of women from the court-martial panel is understandable in light of the absence of any authoritative caselaw at that time that definitively put gender discrimination in this context on a par of unlawfulness with racial discrimination. Only recently has the Supreme Court held that the former is as legally reprehensible as the latter. *See J.E.B. v. Alabama ex rel. T.B.*, __ U.S. __, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

SJA recommended that the convening authority "select 12 officers to serve as court members," who "should be designated by placing numbers 1 thru 12 next to their names." Additionally, he recommended that the convening authority "select 15 officers to serve on the above panel" as alternates in the event that "approved absences or challenges cause the number of members available to fall below prescribed limits." These alternates, he suggested, "should be designated by placing numbers 13 thru 27 to signify the order in which they should serve on the court-martial panel."

The member-selection list given to the convening authority contained each officer's name, rank, social security number, unit, race, and sex, as well as a blank line on the left margin next to each nominee's name for the convening authority to indicate his selections. Every one of the nominees next to which the convening authority placed numbers 1 through 12 was a white male. Of the 15 officers next to whom he placed numbers 13 through 27, two were African-American: Major Taylor was numbered 14, and Major Staples was numbered 17.

159. Implementing the SJA's recommendation and the convening authority's selections, the latter promulgated CMCO #4 on February 14. Through this order, the convening authority withdrew appellant's case from a racially mixed court-martial panel of all men (CMCO #1) and referred it to an all-white, all-male panel of 12 officers. App. Ex. XLI at 18-20.

***Court-Martial Convening Order***
***Numbers 7 and 8***

On February 21, at a session convened under Article 39(a) UCMJ, 10 USC § 839(a), defense counsel highlighted the fact that all 12 of the panel members were white males. In that light, he expressed concern that the only information on the selection sheets—other than innocuous data of names, ranks, social security numbers, and units—was racial and gender identifiers. Based on the uniform composition of the panel and on the nearly uniform composition of the list of nominees from which the convening authority selected the panel—made further suspect by the pointed inclusion of the racial and gender identifiers on the selection sheets—counsel advised that the defense "would probably have a motion" relating to the lawfulness of the selection process, both as to "he people given to the Generral to select" and as to "the people selected by the General."



At the same session, appellant requested enlisted members on his panel. Defense counsel made clear at the time that his client felt compelled to make such a request in the hope of getting a better cross-representation,[3] that the request was not the result of any real desire by appellant for enlisted members; and that the defense felt that the only way they could learn the race and gender of the enlisted members that the convening authority would appoint would be to request such members. He indicated, however, that appellant might well withdraw that request later and that, in any event, appellant was entitled to a lawfully selected officer panel, without regard to whether appellant did or did not want enlisted members.

160. The next day, on February 22, the convening authority

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[3] It might be argued that counsel's use of such phrases as better cross-representation and cross-section of the community sounds like an objection lodged under the Sixth Amendment right to trial by a jury of peers, which is inapplicable to courts-martial, rather one under the Fifth Amendment rights to equal protection and due process, which are applicable. *See United States v. Santiago-Davila*. 26 MJ 380, 389-90 (CMA 1988). It was abundantly clear, however, both in defense counsel's written motion and brief and in his advocacy in the courtroom that appellant's objection to the selection process included the Fifth Amendment grounds. In any event, even if counsel's bases had not been so clear, I would be unwilling to invoke waiver under these circumstances. Addressing such a possibility in *Santiago-Davila* the Court declined "to apply the doctrine of waiver so strictly—especially when we are dealing with a fundamental constitutional right not to be the victim of purposeful racial discrimination and when the defense has asserted a closely-related constitutional claim." *Id.* at 390.

provided 6 enlisted members. This action later was effected by CMCO #7, published on March 24, in which the convening authority relieved 5 of the original white male members: COL. Webb, LTC Hardie, MAJ Napoli, CPT Williams, and CW3 Hasenhauer—numbered 1, 4, 9, 10, and 11 on the member-selection listt. App. Ex. XLI at 18-20. In their stead, the convening authority detailed six enlisted members, three of whom were African-American males and one of whom was an African-American female (the other two were white males). The selection sheets used for this panel (App. Ex. XLVII at 3-14), like those in use for the panel detailed under CMCO #4 (App. Ex. XLI at 18-20), contained racial and gender identifiers.

True to his promise of February 21, defense counsel submitted a written motion on March 13 that was captioned, "MOTION FOR APPROPRIATE RELIEF: CHALLENGE TO VALIDITY OF REFERRAL DUE TO ERRORS IN PANEL SELECTION PROCESS." Therein, counsel claimed that "the process for selection of panel members in this case has resulted in a violation of the accused's right to Due Process and Equal Protection under the Fifth Amendment." App. Ex. XLI at 1. He relied principally on such cases as *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); and *United States v. Smith*, 27 MJ 242 (CMA 1988). Counsel's brief made clear that the "scope" of the requested

> inquiry is broad. It should involve every aspect of the panel selection and referral process, to include both the persons selected for duty and the nominees not selected, the staffing of the action, the decisionmaking process of the convening authority, the population from which the selection was made, and the personal attitudes and motivations of the people involved in the selection process. . . .



161. Counsel acknowledged in his brief that the defense had the burden to make a *"prima facie"* showing of denial of equal protection "in order to shift the burden to the Government to disprove" that showing. *Casteneda v. Partida, supra* 430 U.S. at 495, 97 S.Ct. at 1280. Thereafter, at some length, the defense sought to make this *prima facie* case by showing: 1) that "the defendant is a member of a recognizable group singled out for different treatment," *citing Hernandez v. Texas*, 347 U.S. 475, 478-79, 74 S.Ct. 667, 670-71, 98 L.Ed. 866 (1954); 2) that there is "underrepresentation of his group on the panel" by making statistical comparisons of the numbers of African-Americans and women on the panel with the numbers among the local military population; and 3) that "the underrepresentation may be due to unconstitutional activity." App. Ex. XLI at 5.

After extensive argument on these points, counsel then urged that, the *prima facie* showing having been made, "[t]he Government has the burden of proof to 'explain adequately the racial exclusion.' *Batson*, 476 U.S. at 94 [106 S.Ct. at 1721]." Ultimately, counsel urged that the remedy requested was for the military judge to "strike down the referral of this case as violative of the accused's right to Due Process and Equal Protection under the Fifth Amendment . . . and return the case to the convening authority. The defense also requests the military judge strictly scrutinize all actions by the command with regard to this trial in light of the developments in this case."

While discussing this motion at an Article 39(a) session, defense counsel reiterated that their earlier request for enlisted members had been conditional and with the express understanding that it might be withdrawn later. Counsel explained that the request was an effort to try to get "a more representative panel" than the "all-white, all-male panel" of officers detailed under CMCO #4. When the military judge queried whether the convening authority had not done exactly what appellant wanted—that is, given him members of his race on the panel in the form of

enlisted membership—the defense responded:

> [W]e feel like we shouldn't have to be made to make some kind of election, in order to try and get a panel that's not in violation of the Equal Protection Act [sic]—it puts an unnecessary burden on the defense. We'd like to have the problem with the officer panel solved, before—instead of putting the burden on us, to cure the Government's error, in this case. And, all we're saying is that they—that it's up to them to rebut; they need to present evidence to rebut this prima facie case. . . .

162. On March 23, the military judge denied appellant's motion for a new officer panel. He explained his decision as follows:

> In my view, there aren't any factual issues to be resolved. There is no per se right to have minority representation on a court-martial panel. None of the officer court members listed on the convening order is black. Numerous black enlisted soldiers have been designated to sit. The accused, initially, as I understand, elected to be tried by a panel of officers and enlisted soldiers. Now, I've been told, however, that that's not the case; that the accused wishes to be tried by officer-members only. Black officers have been designated as alternate court members. The pool of officers from which to choose was somewhat limited, in that the Convening Authority, in this case, wanted individuals arriving at Fort Hood after 1 January 1989, and officers nominated from Fort Sill, Oklahoma. This was done to allay defense concerns about pretrial publicity. Because of these self-imposed limitations, the number of black officers from which to choose shrank significantly. I agree with the trial counsel that, consequently, presenting demographic statistics for all of Fort Hood and the racial breakdown of officer/enlisted members becomes somewhat irrelevant. Other than raw statistics, the defense has not presented evidence or made offers of proof to cause me to conclude that blacks have been arbitrarily excluded from the officer-panel selection process, or that the Convening Authority was racially-biased in his selection process. The defense has conceded that, in the past, this Convening Authority has appointed senior and junior black officers to sit on panels. In reviewing the documents concerning the selection of enlisted soldiers, it is clear that the Convening Authority had a far greater pool of minority soldiers from which to choose. He chose several black enlisted soldiers to sit on this panel. Again, earlier in the trial, the accused indicated that he wished to be tried by officers and enlisted—that's not now the case—but, the fact that several black NCOs were selected to sit, by the Convening Authority, is strong circumstantial evidence, in my view, that the selection of the officer panel was done without racial animus and without any sinister motives. If the Convening Authority was trying to manipulate the system, surely black NCOs or black enlisted soldiers would have also been excluded. The Convening Authority—or, the selection of the officer-panel members was done in accordance with law and regulation. The selection process violated none of the rights of the accused.



On March 23, appellant formally withdrew his request for enlisted members and asked for an all-officer panel. By memorandum dated March 24, the SJA recommended that the convening authority "appoint an additional 5 officers to the 7 previously selected to sit as court members in this case [CMCO #7]." He advised the convening authority that those 5 could be 1) the

same 5 earlier relieved when appellant had "requested enlisted members"; 2) "[t]he next 5 alternate officer members previously selected"; or 3) "[a]ny other alternate officer member previously selected or any officer of your command who, in your opinion, meets the requirements of Article 25. . . ." The SJA furnished the convening authority with member-selection sheets that contained all of the officers on the prior selection sheet including the seven who remained on the panel pursuant to CMCO #7.

163. The same day, the convening authority published CMCO #8 by which he relieved the six enlisted members and detailed five additional officers. Of these, three had been among the five officers relieved when appellant had requested enlisted members: MAJ Napoli, CPT Williams, and CW3 Hasenhauer. The other two who had been relieved—COL Webb and LTC Hardie—in the meantime had undertaken conflicting obligations that they were unable to reconcile on such "short notice."

The two new faces were MAJ Staples, an African-American male who had been numbered 17 on the original selection sheet, and LTC Dobbs, a white male who had been numbered 16 on that sheet. There is no explanation why the convening authority skipped over the officers that earlier he had numbered 13, 14 (MAJ Taylor, an African-American male), or 15; this, notwithstanding the SJA's advice in his memorandum accompanying the original selection sheet that the convening authority should number his selections for alternates "13 thru 27 to signify the *order in which they should serve* on the court-martial panel" if needed. (Emphasis added.)

Ultimately, then, the final panel selected (CMCO #8) by the convening authority consisted of 11 white male officers and 1 African-American male officer; of the 5 alternates, 2 were African-American males, and none was a woman. App. Ex. LXVIII at 1-3. The single African-American detailed as a primary member was not challenged and did sit as one of the eight members who convicted and sentenced appellant to death.



**B**

***Constitutional Chracter of Appellant's Complaint***

164. In the recent opinion of the Supreme Court in *J.E.B. v. Alabama ex rel. T.B.*, — U.S. —, —, 114 S.Ct. 1419, 1421, 128 L.Ed.2d 89 (1994), Justice Blackmun began the Opinion of the Court as follows:

> In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. The Court explained that *although a defendant has "no right to a 'petit jury composed in whole or in part of persons of his own race,' " id.* at 86, 106 S.Ct., at 1717, quoting *Strauder v. West Virginia*, 100 U.S. 303, 305, 25 L.Ed. 664 (1880), *the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Id.*, 476 U.S. at 85-86, 106 S.Ct. at 1717. Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. *See Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *Georgia v. McCollum*, 505 U.S. —, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

(Emphasis added.) This what appellant's complaint is all about;

and the majority's attempt to gloss over this constitutional argument is unpersuasive.

The majority's truncated treatment of appellant's constitutional challenge implicity relies upon three, stepped, fall-back positions: 1) Because a military accused is not entitled constitutionally to a trial by his peers, *Batson* and *J.E.B.* somehow apply differently to racial and gender discrimination in courts-martial than they do in civilian trials; 2) even if they do apply fully to courts-martial, they apply only to such discrimination as it is manifest in peremptory challenges in the courtroom, not to the same discrimination that might be manifest at other stages in the jury-selection process; and 3) even if they apply to courts-martial and even if they apply to the entirety of the jury-selection process, Article 25, UCMJ, 10 USC § 825, somehow permits different application to the stage of the process at which the convening authority selects the members. Each of these arguments may be quickly joined and rejected.

165. First, appellant's lack of a right to be tried by a jury of his peers does not translate into lack of a right to have the factfinders selected without regard to racial or gender stereotypes. In *United States v. Santiago-Davila,* 26 MJ 380 (CMA 1988), this Court foursquare applied *Batson's* constitutional veto of racial discrimination against civilian jurors to identical discrimination against members of courts-martial. We reaffirmed that unwavering commitment as recently as last term in *United States v. Greene,* 36 MJ 274 (CMA 1993). I assume that the majority does not intend to sound retreat from those cases, but I cannot reconcile the majority opinion here with them.

Second, the majority cannot escape the inescapable by any hint that *Batson's* conditional sword is unsheathed only in the courtroom and only to protect against litigants' challenges. The Supreme Court long ago recognized the extended swath cut by such a sword in search of stereotype class discrimination in *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690



(1975), where the Court struck down a gender-discriminatory jury registration requirement as a violation of the Sixth Amendment. In *J.E.B. v. Alabama, supra,* the Court made clear that while "*Taylor* relied on Sixth Amendment principles, . . . the opinion's approach is consistent with the heightened equal protection scrutiny afforded gender-based classifications." — U.S. at —, 114 S.Ct. at 1424. Indeed, the *Batson* Court itself made specific reference to examination of the various stages of the selection process in search of unlawful discrimination. 476 U.S. at 87-88, 106 S.Ct. at 1718.

Finally, the majority cannot scramble for refuge behind the shield of Article 25 in order to insulate the member-selection process and to isolate application of *Batson* and *J.E.B.* to peremptory challenges. This statute, without any parallel in civilian justice systems, permits the convening authority to handpick members for a court-martial panel who are "best qualified for the duty," Art. 25(d)(2), from among those "eligible" to serve, *see* Art. 25(a), (b), (c)(1), and (d)(1). Even in the context of such unique power of subjective discretion, however, I would think it would be clear from *Batson* and *J.E.B.* (but perhaps it needs to be bluntly asserted); "White male" is not a proxy for "best qualified," either constitutionally or logically. It is precisely such short-hand equation of group stereotypes with competence that the Supreme Court rebuked in *Batson* and *J.E.B.*

166. Accordingly, it should be clear from these cases that racial and gtender discrimination at any stage of the selection process violates the Fifth Amendment. The majority's slight-of-hand that seeks to divert attention by calling such perniciousness "court stacking" changes nothing.[4] "Court stacking" discrimination on the basis of race or gender violates not only Ar-

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[4] The implicit diminution of the seriousness of the discrimination by calling it simply "court stacking" is akin to an argument addressed by the Su-

ticle 25, but also the Fifth Amendment. Changing the name of the evil changes neither the nature of the evil, the standards and the burdens for measuring it, nor its constitutionally required remedy. Fifth Amendment law applies here,[5] not Article 25 law.

***Invoking the Right: Who Does What and When***

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preme Court in *J.E.B. V. Alabama,* — U.S. at — n. 14, 114, S.Ct. at 1428 n. 14:

> The popular refrain is that *all* peremptory challenges are based on stereotypes of some kind, expressing various intuitive and frequently erroneous biases. But where peremptory challenges are made on the basis of group characteristics other than race or gender (like occupation, for example), they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life. *See* B. Babcock, A Place in the Palladium, Women's KRights and Jury Service, 61 U.Cinn.L.Rev. 1139, 1173 (1993).

(Citation omittted.)

[5] In *Davis v. United States,* — U.S. —, — n. *, 114 KLS.Ct. 2390, 2354 n.*, 129 L.Ed.2d 362 (1994), the Supreme Court noted that it "never had occasion to consider whether the Fifth Amendment privilege against self incrimination, or the attendant rights to counsel during custodial interrogation, applies of its own force to the military. . . ." Noting that the President through the Manual for Courts-Martial and the Court through its opinions has fully applied the Supreme Court's cases in that area to courts-martial, the Court "proceed[ed] on the assumption" that its cases applied "to courts-martial just as they apply to state and federal criminal prosecutions." Similarly, as to the Fifth Amendment provisions that protect against racial and gender discrimination in jury selection, this Court in *Santiago-Davila* and *Greene* has fully applied Supreme Court cases to courts-martial. Unless and until the majority of this Court forthrightly holds otherwise, then, and in the absence of any indication from the Supreme Court to the contrary, I will proceed on the basis of our precedent that fully applies this Fifth Amendment protection to courts-martial.



Prior to the *Batson* decision, a criminal defendant who complained of denial of equal protection from racially discriminatory exclusion of jurors had to prove systematic exclusion of members of a certain race. *See Batson v. Kentucky,* 476 U.S. at 82 n. 1, 106 S.Ct. at 1715 n. 1; *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 18 L.Ed.2d 759 (1965). A defendant seeking to do so was faced with a presumption, otherwise, that no such purposeful exclusion had occurred. *Id.* at 221-22, 85 S.Ct. at 836-37. Over time, lower Federal courts "reasoned that proof of repeated striking of [members of a particular race] over a number of cases was necessary to establish a violation of the Equal Protection Clause." *Batson v. Kentucky,* 476 U.S. at 92, 106 S.Ct. at 1720.

The *Batson* Court, however, "reject[ed] this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." 476 U.S. at 93, 106 S.Ct. at 1721. While the defendant continues to carrry the burden of persuasion on the issue, now "[c]ircumstantial evidence of invidious intent may include proof of disproportionate impact." 476, U.S. at 93, 106 S.Ct. at 1721. The "totality of the relevant facts" may give "rise to an inference" of purposeful discrimination sufficient to make the required *prima facie* showing. 476 U.S. at 94, 106 S.Ct. at 1721. One recognized means of doing so is to prove "that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination.' " 476 U.S. at 95, 106 S.Ct. at 1722. In short, to carry the burden of persuasion successfully, a complaining defendant need not show systemic discrimination over time but may rely, instead, on facts relating to the selection of jurors solely in *his* case.

167. Once a defendant makes a *prima facie* showing of purposeful discrimination based on the totality of the circumstances,

the Government is required to come forward and articulate a neutral explanation for its actions relating to the particular case then at trial. Mere denial of "discriminatory motive" or assurance of "good faith" will not suffice. 476 U.S. at 98, 106 S.Ct. at 1723-24. Thereafter, the judge has "the duty to determine if the defendant has established purposeful discrimination." 476 U.S. at 98, 106 S.Ct. at 1724. This finding concerning discrimination is one of fact. 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21.

The Court in *J.E.B.* made clear that resolution of a claimed discrimination by gender follows the same process. Justice Blackmun explained:

> As with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. When an explanation is required, it need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual. *See Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

—U.S. at — - —, 114 S. Ct. at 1429-30.

C

At the outset of considering how the events leading to selection of appellant's court-martial panel measure against the legal principles just set forth, I should plainly state that the issue as I see it is not whether the convening authority did in fact violate appellant's Fifth Amendment right to equal protection; rather, it is whether the military judge correctly analyzed and disposed of



appellant's claims under *Batson* and *J.E.B.* that the convening authority did so.

In several respects, I believe that the military judge did not. In discussing appellant's claims and the military judge's response to them, I will follow the analytical construct of *Batson, J.E.B.*, and *Greene*, 36 MJ at 278 n.2.

***Step 1: Prima Facie Showing of Purposeful Discrimination***

168. Appellant met his initial burden of making a *prima facie* showing of purposeful discrimination in selection of the court members. Actually, he did so as to three distinct Fifth Amendment violations.

First, when the convening authority withdrew appellant's case from the racially mixed panel of members detailed in CMCO #1 and referred it to the all-white panel of members in CMCO #4, and when the defense complained of this, there was a *prima facie* showing of a *Batson* violation. This Court stated in *United States v. Greene*, 36 MJ at 278, that a *prima facie* showing is made "when a trial counsel exercises a peremptory challenge to exclude 'a member of a congnizable racial group,' 476 U.S. at 96, 106 S.Ct. at 1723, from membership on a court-martial and the challenged member is also of the same race as the accused." I fully agree with the practical view of the world expressed by Judge Cox in his separate opinion in *United States v. Carter*, 25 MJ 471, 478 (CMA 1988), that the convening authority's decision not to choose some of the nominees for court-martial service is "the functional equivalent of an unlimited number of peremptory challenges." Thus, when the convening authority withdrew appellant's case from a racially mixed panel and referred it to an all-white panel, his action was akin to a prosecutor exercising peremptory challenges against the members of the racially-mixed panel. That is enough, under *Greene*, to establish a *prima facie* showing of purposeful discrimination which, in turn, triggers the Government's responsibility to offer a race-neutral explanation.

Second, appellant demonstrated "that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing 'the opportunity for discrimination.' " *Batson v. Kentucky*, 476 U.S. at 95, 106 S.Ct. at 1722. Of the list of 45 officer nominees sent to the convening authority from which he selected the members subsequently detailed on CMCO #4, only 4 were African-American (less than 9%). From this list, the convening authority selected 12 officers as members; none was African-American (0%). These figures compare adversely to the statistical data furnished by the defense relative to the African-American officer population at Fort Hood (15%) and at Fort Sill (12%), App. Ex. XLI at 63 (Hood), at 64 (Sill).

169. I recognize that the convening authority also selected 15 other officers as alternates, of which 2 were African-American (13%). App. Ex. XLI at 18-20. Of course, selection of alternates—*possible* members of the court-martial—conceptually does nothing to vitiate the prima facie case of discrimination in choosing the *actual* members. This conclusion has real force, as well, given the practical unlikelihood that, in the absence of some unforeseen circumstance, any alternate actually would be detailed when there were 12 primary members.

Related to use of alternates, one other matter is worth at least momentary pause. Interestingly, in this case, the SJA appeared to suggest early-on a mechanism for determining which alternates would be detailed as members if ever they were needed (by recommending that the convening authority, in selecting members for CMCO #4, number the alternates 13 through 27 "to signify the order in which they should serve on the court-martial panel"), and the convening authority apparently accepted that recommendation. Nonetheless, the moment that the opportunity actually arose to detail alternates, the convening authority abandoned that mechanism without so much as a tip of his hat—detailing numbers 16 and 17, rather than 13 and 14.

Appellant having shown statistical underrepresentation of



African-Americans during the selection process, the second prong required of this showing scarcely can be disputed: The members were "selected under a practice providing 'the opportunity for discrimination.' " *Batson v. Kentucky*, 476 U.S. at 95, 106 S.Ct. at 1722. Members of the convening authority's subordinate commands were entirely free to nominate any officer for selection that they deemed appropriate, their discretion being fettered only by Article 25. As to the selection by the convening authority, this Court often has acknowledged the convening authority's sole discretion in this regard under Article 25. *See, e.g., United States v. Greene*, 20 USCMA 232, 238, 43 CMR 72, 78 (1970). *Cf. Castaneda v. Partida, supra* ("key-man" system for selecting grand jury members—where state judge chose commissioners who, in turn, selected prospective grand jurors based on certain statutory criteria such as citizenship, literacy, sound mind, moral character, and lack of criminal record, 430 U.S. at 484-85, 97 S.Ct. at 1275—was "highly subjective" since commissioners used own discretion and was susceptible of abuse since Hispanic surnames were obvious from the jury rolls). 430 U.S. at 497, 97 S.Ct. at 1281.

170. Just as surely as it is within a prosecutor's private and sole discretion to decide whom to challenge peremptorily, so is it within a commander's discretion who to nominate and within a convening authority's discretion whom to select. Equally, the authority is subject to abuse. Thus, just as surely as a prosecutor's peremptory challenge triggers a duty to explain when proper objection is made, a similar duty arises in the face of substantial underrepresentation of a race or gender among the nominees or selectees. Neither the fact that Article 25 states neutral selection criteria nor any "presumption that the officials discharged their sworn duties" will rebut a *prima facie* case of discrimination. *See Castaneda v. Partida*, 430 U.S. at 498 n. 19, 97 S.Ct. at 1282 n. 19.

Further, in this case, the only personal information on the nomi-

nees reflected on the nomination sheets were their race and gender. While such identifiers in themselves may not constitute an evil, see *United States v. Green*, 37 MJ 380 (CMA 1993), their pointed inclusion here certainly heightened " 'the opportunity for discrimination.' " *See Castaneda v. Partida, supra.*

The third distinct *prima facie* showing of a Fifth Amendment violation concerns exclusion of women. *No* woman was on the officer panel in CMCO #1; *no* woman was on the officer panel in CMCO #4; only 1 woman was on the enlisted group detailed to the panel in CMCO #7; and, once appellant withdrew his request for enlisted members which occasioned relieving that sole woman and detailing additional officers, *no* woman was on the panel ultimately detailed to try appellant. Overlaying the preceding analysis on these facts, surely a *prima facie* case of gender discrimination was made: The female gender statistically was grossly underrepresented, and the members were selected under a system that provided "opportunity for discrimination." That is all that is required by *J.E.B.*

171. Finally, regarding appellant's *prima facie* showing of discrimination, I am unrpersuaded by the majority's reliance on the convening authority's post-objection action of detailing African-Americans and one woman as enlisted members. The heterogeneity of the enlisted representation on the panel is in stark contrast to homogenous officer representation on this same panel. This contrast between the officer and enlisted communities of the panel only raises more questions than it answers about the circumstances of detailing members in this case and, if anything, supports appellant's *prima facie* showing of discrimination.

***Step 2: Race-neutral Explanation***

As to each of these three distinct *prima facie* showings of purposeful discrimination, the burden shifted to the Government to offer a race-neutral explanation. In the usual case, in which the apparent discrimination is in the form of a prosecutor's peremptory challenge, this explanation might well take the form of an oral representation by the prosecutor as to his motivation for



the challenge. After all, the alleged offending official is present in the courtroom, and his explanation might be viewed as an offer of proof or, in a way, as evidence itself for this limited purpose.

When the official is the convening authority (as to his selection of the members) or his subordinate commanders (as to their nomination of potential members), however, that is not the case. Trial counsel has no first-hand "evidence" to offer by way of explanation—indeed, he likely has no dreamy idea why those officers acted as they did. In this context, then, it would seem logical that the only way in which the Government can meet its burden to come forward with a race-neutral explanation for the apparent purposeful discrimination is actually to offer *evidence. Compare Batson v. Kentucky, supra* (counsel needed only to offer oral explanation for his exercise of a peremptory challenge), *with Castaneda v. Partida*, 430 U.S. at 498, 97 S.Ct. at 1282 (Court remarked on absence of evidence to explain commissioner's out-of-court alleged discrimination).

172. In this case, no evidentiary hearing was held by which the Government could offer a race-neutral explanation for the three instances of apparent purposeful discrimination noted earlier. In light of the fact that the alleged offenders were not in the court room and never were called to the courtroom, and given the highly personal and subjective decisions that are in question (that is, nominating and selecting officers "best qualified" for service), it would seem beyond question that any "explanation" divined by the military judge here was speculation, no more and no less. That is inadequate.

Moreover, even the speculation seems to fall short. For instance, regarding the withdrawal of appellant's case from CMCO #1, the military judge suggested, "This was done to allay defense concerns about pretrial publicity." Of course, assuming such defense concern, it in no way inevitably justified an abrupt withdrawal of the case from a panel that had not been subject to any

*voir dire* regarding the impact of publicity on their ability to serve. Neither does it in any way whatsoever explain why the replacements were all-white.

The military judge did touch upon this latter concern when he made reference to the convening authority's "self-imposed limitations" of restricting the eligible pool of officers at Fort Hood to those who had arrived on or after January 1, 1989 (only $1^1/_2$ months earlier). Finding—on the basis of what, I am unsure—that this decision "shrank significantly" "the number of black officers from which to choose," the military judge essentially dismissed the defense's statistical data that showed substantial underrepresentation of African-Americans. Apart from any evidentiary basis for this conclusion, I have to wonder at the illogic of justifying an apparently discriminatory action by one's own intentional prior decision that would make such discriminatory effect virtually inevitable.

As to the *prima facie* showing of gender discrimination, there does not appear anywhere even a fainthearted effort to offer any gender-neutral explanation.

***Step 3: Factfinding as to Discrimination***

173. The final step in resolving *Batson* and *J.E.B.* issues is for the trial judge to decide whether the objecting party has carried his burden of showing purposeful discrimination. This is a factfinding exercise, *Batson v. Kentucky,* 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n. 21, and the military judge's curious view that "there aren't any factual issues to be resolved" reflects a serious abdication of his responsibility.

Moreover, he simply was dead wrong when he stated, "The accused, initially, as I understand, elected to be tried by a panel of officers and enlisted soldiers." The defense made abundantly clear that its request for enlisted members was a tactical move in the hope of avoiding the all-white officer panel and in order to learn the race and gender of the enlisted members who would be



detailed. In no way, either initially or ultimately, did appellant indicate a wish actually to be tried by other than a panel of officers; he simply sought a panel the selection of which was not apparently infected by purposeful racial and gender discrimination. He may not be forced to abandon his statutory right to an officer panel and to add enlisted members in order to get what the Constitution guarantees him. *See United States v. McClain,* 22 MJ 124 (CMA 1986).

I could spend a good deal of time discussing—literally sentence by sentence—the flaws in the military judge's rationale for denying the defense motion. For instance, his reference to the convening authority's detailing African-American members to other courts-martial as a factor to defeat appellant's *prima facie* claim flies in the face of the fact that, since *Batson,* it no longer is required as it was under *Swain* to show a *pattern* of purposeful discrimination over time. Little would be gained, however, form such further dissection. Suffice to note here that the military judge for the most part did not engage in the required factfinding and, when he did seem to do so, acted on the basis of guesswork instead of evidence.

**D**

174. In sum, then, I believe that the majority opinion falls far short of the mark of reflecting an adequate treatment and resolution of appellant's persistent claims of purposeful race and gender discrimination in the selection process that culminated in the panel that finally tried him. Just as troublesome, I am convinced that a proper analysis under *Batson* and *J.E.B.* and related Supreme Court cases, as well as *Santiago-Davila* and *Greene* from this Court's precedent, ineluctably leads to this conclusion: The military judge apparently did not understand that analytical construct for resolving claims of purposeful discrimination in court-member selection and did not fulfill his responsibility in that construct.

Accordingly, I would return the record to the convening authority for an appropriate evidentiary hearing and for a proper analysis and resolution of appellant's claims based on the resulting evidence. Anything short of such action tolerates not only a conviction but likely an execution of a human being under an unresolved cloud of suggested purposeful racial and gender discrimination.

III

As the majority acknowledges, 41 MJ at 253, this Court held in *United States v. Curtis*, 32 MJ 252, 270-71, *cert. denied*, — U.S. —, 112 S.Ct. 406, 116 L.Ed. 2d 354 (1991), that proportionality review of an adjudged death sentence is required by Article 66(c), UCMJ, 10 USC § 866(c). The second time that case came before this Court, we suggested; "[I]t would be fitting for the Court of Military Review to consider generally similar cases reviewed by the Supreme Court of the United States in which state courts have imposed the death penalty for like crimes on that basis." *United States v. Curtis*, 33 MJ 101, 109 (CMA 1991) (*Curtis II*), *cert. denied*, — U.S. —, 112 S.Ct. 1177, 117 L.Ed.2d 421 (1992). This suggests a possible *universe* of cases against which to compare appellant's case for proportionality, but it does not address the equally troublesome question of which *factors or points of identity* will be used for comparison against cases in that universe.

175. I read appellant's contention in this Court (Issue XL—at 290) to focus primarily on the latter, but the majority opinion, like the court below, ignores the latter and finds comfort in its resolution of the former. I am unable to understand how the majority can satisfy itself that the statutorily required comparison was made without coming to grips with the question regarding on what bases that comparison must be made.

The universe of cases that was suggested in *Curtis II* —that apparently was followed by the Court of Military Review in this



case and that apparently satisfies the majority here—is relatively clear: It includes cases 1) reaching the Supreme Court from all of the state jurisdictions 2) where the death penalty actually has been adjudged 3) for like crimes. While the question of an appropriate universe is incredibly complex, I have no particular quarrel with this definition.

Within this universe, the Court of Military Review found the five cases cited by the majority, see 41 MJ at 290, although it is not at all clear that the Court of Military Review considered only those five cases, see 34 MJ 956, 969 n. 18 (1992) ("Among the cases examined were ..."). After examining those cases, the court "concluded that the sentence is generally proportional to those imposed by other jurisdictions in similar situations." 34 MJ at 969. The only indication of points of comparison is in the very general phrase, "in similar situations."

In light of the majority's avoidance of the issue, I do not believe that it is appropriate for me, now, to offer a view of appropriate points of comparison. One approach that certainly suggests itself is a comparison of aggravating factors and of aggravating and mitigating circumstances; a rather complex scheme for implementing this approach was discussed in *State v. Marshall*, 130 N.J. 109, 613 A.2d 1059, 1075-76 (1992). Others might reasonably be suggested and found suitable.

176. For now, I shall limit myself simply to saying this: Selecting an appropriate universe of cases against which to conduct a proportionality review is useless unless the Court of Military Review, having defined the universe, knows what points of comparison it will look for. The Court of Military Review in this case did not define those points of comparison; appellant has complained of that; but the majority here shuffles his complaint off into a discussion of universe, instead. That is a *non sequitor.* An appellant facing execution deserves more. So does the rest of society.

## IV

In Issue LXVIII, appellant asks, in part, "whether the system of appointing capital defense counsel in the military is inadequate... in that the military system cannot provide adequate continuity of counsel..." I am persuaded that the "military system" *can* "provide adequate continuity of counsel." Regrettably, however, generally it has not done so, and I take this opportunity to express at least this Judge's growing concern over the failure of the pattern of assignment of appellate counsel to provide continuity in death-penalty cases—continuity that assures the client competent representation and that assured the system of appellate judicial review that it can proceed with some modicum of efficiency and effectiveness.

The majority writes: "To the extent that appellate counsel have lacked experience or suffered from lack of continuity, the impact has been on the efficiency of judicial administration rather than the quality of representation." 41 MJ at 299. Describing the bend-over-backward approach that has been followed in an effort to avoid harm to appellant from lack of continuity of appellate representation, the majority recites:

> Recognizing the potential inefficiencies noted above, both the court below and this Court have liberally granted extensions of time and allowed filling of supplemental pleadings and citations of authority even after oral argument. This Court has considered issues not raised before the court below.... [We] have accommodated counsel to the maximum extent possible to ensure that all issues are considered. Defense appellate counsel concede that their pleadings have been voluminous, with overlapping and redundant assignments of error.

41 MJ at 299. That is no way to run a ship!



***The Ungoverned Revolving Door of Defense Counsel***

177. Seven appellate counsel represented appellant in the Court of Military Review; five others represented him in this Court.[6] It is unclear at times who was the lead counsel in the Court of Military Review because counsel is not required by that court's Rules of Practice and Procedure or by the court's internal operating procedure (see Rule 26, Court of Military Review Rules of Practice and Procedure, 22 MJ CXXXVIII) to file a motion for leave to withdraw if the reason for withdrawl was reassignment outside the Defense Appellate Division and if the chief of that division assigns new counsel from within the division. *See* para. 2-2, USACMR Internal Operating Procedure, 1986; Ruel 13.1(b)(2), USACMR Internal Rules of Practice and Procedure (1992). *Compare* Rule 16(b), Rules of Practice and Procedure, United States Court of Military Appeals, 38 MJ LXXXIV. No expression of concern appears anywhere for even informing the client of an impending change in representation, much less seeking the client's views. *See* Standard 5-5.3, ABA Standards for Criminal Justice, Providing Defense Services (2d ed. 1986); Rule 16(b), USCMA Rules, *supra*; Rule 1.16(d), AR 27-26, Professional Conduct for Lawyers (1992).

The confusion is so pervasive that even opposing counsel demonstrated confoundment: In a notice of appearance filed on June 24, 1991, the lawyer who apparently, but not clearly, was appellant's third lead counsel in the Court of Military Review observed in a footnote that a government motion for extension

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[6] In the Court of Military Review, the following counsel represented appellant at one time or another during the barely more than 1½ years this case was pending there: Captain Ralph Gonzalez (lead); Captain James K. Lovejoy; Captain Timothy Riley; Colonel Robert Kirby; Captain Michael Coughlin (lead); Captain Emmett Wells (lead); and Captain James Heaton. The following counsel have entered appearances in this Court: Captain Teresa Norris (lead); Captain David Thomas; Major Fran Walterhouse; Lieutenant Colonel James Weise; and Captain Roy Hewitt.

of time filed 3 days earlier had asserted: "Appellate defense counsel, Captain Michael Coughlin, does not oppose this motion." Appellant's counsel continued by noting, however: "Captain Coughlin was released from this case several weeks ago by the Chief, Defense Appellate Division, as he was pending reassignment to a commissioner's position with this Court."

178. Moreover, without even scratching the surface, it is clear from various pleadings in this case that lack of continuity and accountability of counsel directly caused substantial inefficiencies at both appellate levels. For example: This same lawyer revealed in an affidavit that he was asked to assume lead chair representing appellant in June 1991 because Captain Coughlin had been reassigned, over objection of the Chief, Defense Appellate Division; this lawyer, of course, found that assuming this responsibility on top of his other cases (he was not relieved of his normal workload) was extraordinarily burdensome; these pressures precluded him from attending any educational seminar on capital litigation (he "had no experience or specialized training in the field of capital litigation") or to meet with appellant until after oral argument or to engage in any "extra-record investigation"; and that, when he was approached by a commissioner of the Court of Military Review in November 1991 about scheduling oral argument, the lawyer "had not even completed reading the record of trial." Notwithstanding his expression of a wish for a date in January 1992, oral argument was set for December 9, 1991. Def.App. Ex. A. A motion to reschedule oral argument was denied on December 4, 1991.

Another example: So hard pressed was this lawyer to prepare for oral argument that he "had overlooked prior to oral argument" what he considered to be an important issue, which caused him to file—after oral argument—a motion to submit a Supplemental Assignment of Error. During this same post-argument time frame, he had the opportunity, for the first time, to do some investigation into appellant's medical records (other than those in the record of trial) and into the interpretation of some of those records and tests. This investigation ultimately persuaded him to



file a motion to submit yet a *second* Supplemental Assignment of Error—this time, via a motion for reconsideration *after* the Court of Military Review had issued its decision in this case.

179. It is plainly evident, then, the mischief created in the Court of Military Review from lack of continuity of representation there of appellant: This lawyer found himself so far behind the time curve that, 1 month before argument, he had not even completed reading the transcript and that, after oral argument, he was forced to file two motions to draw additional issues to the court's attention. This is a far cry from traditional concepts of efficient or effective appellate review!

The chaos continued in this Court. The Judge Advocate General forwarded this case to this Court on May 8, 1992, for our mandatory review, see Art: 67(a)(1), UCMJ, 10 USC § 867(a)(1) (1989). On June 24, *yet another* lead counsel for appellant (apparently, the *fourth)* filed a Notice of Appearance and Motion to Hold Case in Abeyance. Therein, she reported that her predecessor, referred to above, had departed the Defense Appellate Division on reassignment to Panama on May 22 and that this "departure was sudden and presents grave problems in regard to the continuity of representation of appellant." She and two other associate appellate counsel had not been detailed to represent appellant until May 11—a scant 11 days before her predecessor's departure. She reported in detail about a variety of events and problems that precluded any of the three from any meaningful discussion at all with her predecessor. "Therefore, the undersigned were left with a 1½ page memorandum from [her predecessor] discussing what he thought were the best issues in the case and two large boxes of disorganized files with a good luck note attached thereto."

The motion represents, as well, that all three of these newly appointed counsel were "woefully underqualified to represent an accused in a capital case." Counsel offered a detailed professional resume of the experience and education of each of the three, which tended to support counsel's assessment. Indeed,

appellant's lead counsel in this Court had no legal experience prior to entering the Army; was assigned directly out of the JAG basic class to the Defense Appellate Division; and little more than 1 year later was assigned as lead appellate counsel in this capital case, without having the benefit of trying a single case in a civilian or military courtroom. Ruefully, the backgrounds of the other two are no more substantial. The disadvantage to which this lack of training and experience put this defense team—brand new, with no continuity at all from prior counsel—is palpable.

180. This Court granted a number of motions for enlargement of time within which to file a defense assignment of errors and brief; each was pursuant to a detailed accounting by defense counsel of their efforts in preparing to represent appellant in this Court as well as to meet their legal and ethical responsibilities to their other clients. Finally, we denied a similar request for more time on October 9,. 37 MJ 16. Less than 1 week later, appellant's lead counsel and one of her associate counsel by separate motions sought this Court's permission to withdraw from this case. In both instances, counsel included a detailed averment of what they already had done to prepare to represent appellant and what they believed yet needed to be done if their legal and ethical responsibilities in this capacity were to be met. In both instances, too, counsel concluded that these tasks were impossible to accomplish within the time permitted by this Court and, so, felt absolutely compelled to ask to be relieved from this dilemma. The supervising attorneys of both these counsel also moved to withdraw.

Ultimately, of course, as the majority opinion implies, competing pressures were worked out, and appellant's appeal proceeded. What I have sought to offer, however, is just some flavor of the professional consternation caused to appellate counsel of good intentions and general competence but of limited experience and special training; of the acute problems with efficient and orderly processing of this case through the course of



appellant's statutorily guaranteed appellate review; and of the untoward picture of our appellate system that all this inevitably portrays.[7]

***Governing the Resolving Door***

181. It is time to fix what is broken.

I am not alone in expressing frustration of this Court at the delays and inefficiencies in capital litigation that are the direct

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[7] Doubts about adequate continuity of counsel and related matters involving the level of defense services to military death-penalty cases recently was the subject of congressional attention. In a letter to the Secretary of Defense, attached to this opinion as Appendix D, the Chairman of the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, expressed concern that:

> (1) defense counsel in military death penalty cases need not have the level of experience required of their civilian counterparts, *cf.* 21 U.S.C. § 48(q)(5)—(6) (setting substantial minimum experience requirements for appointed counsel in federal death penalty trial and post-trial proceedings),
> (2) no procedures are in place—such as a presumption right to appointment and compensation of qualified *civilian* co-counsel—to provide continuity of representation,
> (3) the military justice system may have failed to recognize the necessity of providing the defense with independent and highly qualified investigative and expert services in capital cases at the trial and post-conviction levels.

Highlighting these concerns was intended "to ensure that in proceedings where life itself is at stake, no American serviceman or servicewoman is denied the essential tools of an adequate defense." For excellent general discussion of related problems in connection with defense counsel in trial and appellate litigation of capital cases, *see McFarland v. Scott*, __ U.S. __, 114 S.Ct. 2785, 129 L.Ed.2d 896 (Blackmun, J., dissenting from denial of petition for a writ of certiorari), and sources cited therein; D. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, Unpub. Thesis on file at The Judge Advocate General's School, Army (May 26, 1994).

result of lack of continuity of appellate counsel. For instance, on December 20, 1993, in the appeal of the capital case of *United States v. Gray*, 39 MJ 351, we published an order in which we expressed the Court's "concern[ ] about the management and continuity of appellate representation in this case." We proceeded to direct each counsel of record before this Court in that case to file an affidavit directed at his entry into and departure from active representation of Gray; what counsel had done during his representation; what counsel had done to assure a smooth transition to subsequent counsel when he was reassigned; what had been done to advise Gray about counsel's intended withdrawl and Gray's reaction if any; and why withdrawing counsel had not complied with this Court's Rule 16 by filing a motion to withdraw.

Additionally, as recently as June 17, 1994, in the appeal of yet another capital case—*United States v. Murphy*—this Court published an order that: reflected counsel's assurance "that the withdrawl requirements of Rule 1.16, Rules of Professional Conduct for Lawyers, Army Regulation 27-26 (Legal Services, 1 May 1992), have been satisfied"; granted "the defense motion to extend its final briefing time until September 30, 1994"; and established a briefing schedule for the Government's answer and any defense reply. 40 MJ 288.

182. Importantly, Judge Cox, joined by Chief Judge Sullivan, dissented from further extension of briefing time, noting that the briefs under our rules had been due on September 20, 1993. The reasoning supporting this dissent is telling:

> Extensive briefs were filed in the Court of Military Review. There have been no material changes in the law; the record of trial has not changed; and there have been no other reasons advanced to justify further delay....
>
> Justice delayed is not justice.

40 MJ 288.



My brothers were right: None of these things had changed. Only one thing had changed: Appellate counsel for Murphy—and they changed over and over! The problem in Murphy was not the current lawyers taking more time than necessary to file their brief, and I voted for the order because nothing is gained and much is lost by forcing lawyers into court before they adequately are prepared to be there. Rather, the problem was turnover of appellate counsel that effectively put the case on a virtual treadmill.

My brothers were right about one other thing, too: Justice delayed is not justice—not to the accused and not to society. It is time to resolve the continuity of counsel problem in order to preclude future delays of justice in this regard.

U.S. v. LOVING
Cite as 41 M.J. 213 (1994)

## APPENDIX A

## AFFIDAVIT

I CORTEZ CROFTON AYLOR III, [illegible] ... wish to make the following statement under oath. I was the president of the jury for the court martial of PVT Dwight Loving at Fort Hood, Texas in 1988. As I recall, the jury was responsible for findings and sentencing after hearing all of the testimony. I allowed no discussion of the case between members of the jury outside of the courtroom based on instructions from the judge. No one was allowed to watch local television or read any of the local newspapers. To the best of my knowledge no one on the jury violated this trust. Captain David Thomas of the Defense Appellate Division in Falls Church, VA, contacted me on 23 February 1993 and asked me to outline briefly how I handled the sentencing phase of the trial. The jury received instructions from the judge on sentencing and then we went into the jury room. I explained to the other members of the jury what we were supposed to do and how we would do it. I also reminded everyone that the minimum sentence was life imprisonment as explained to me by the judge. We did not re-vote and aggravating factors during the sentencing procedure. After I was satisfied that everyone understood the rules of evidence and their ramifications and was ready to vote, they would write down the sentence on a blank piece of paper, fold it up and pass it to the junior member of the jury. The junior member would give me the folded pieces of paper and I would read each one aloud to the jury. I was very cautious to avoid any influence on the jury; we all had equal votes in this process. The first vote resulted in the following: 7 votes of; reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and death; 1 vote of reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and life imprisonment. The judge had explained before we adjourned that the death penalty required a unanimous vote. I questioned no one about their vote, it was to be secret. I reviewed the rules of evidence, for everyone, as explained to me by the judge and we all reviewed the evidence in the jury room again. After another 1 1/2 hours of review, I asked if everyone was prepared to vote again. They said they were. We again wrote our sentences on blank pieces of paper, folded and gave them to the junior member of the jury. He gave them to me and I read them aloud to all of the members of the jury. The second vote resulted in the following: 8 votes of; reduce to E1, forfeiture of all pay and allowances, bad conduct discharge and death. I then informed the judge that we had reached a unanimous decision on the sentence. He reconvened the court, officially reviewed our findings and gave them back to me to read to the accused. I read the sentence to PVT Loving. The judge released the jury.END OF STATEMENT *dat*

SWORN BEFORE ME ON _____

CORTEZ C. AYLOR III
Colonel, Engineer
United States Army

State of Kansas
County of Leavenworth

Signed or attested before me on February 24, 1993, by Cortez C. Aylor III.
Wanda R. Fairchild
Notary Public
My commission expires 14 Oct 95

WANDA R. FAIRCLOTH
NOTARY PUBLIC
STATE OF KANSAS





## APPENDIX B

I, Major John C. Napoli, Jr., USA ... affirm that the following is a true and correct statement of what occurred to the best of my recollection during the voting on the sentence of death in the case of Private Dwight J. Loving.

1. As a panel member in the case, I heard all of the evidence during the sentencing portion of the trial.

2. Following the closing arguments and instructions from the military judge, we adjourned to deliberate.

3. Colonel Aylor was the president of the panel and he took charge in leading the discussions. We discussed the facts and evidence in the case.

4. Following Colonel Aylor's remarks, we voted by secret written ballot. Colonel Aylor counted the ballots.

5. Since there was not a consensus, we discussed the facts and evidence in the case again. Afterwhich, Colonel Aylor instructed us to vote again. This vote resulted in an unanimous sentence to death, the voting ceased and the results were marked on the sentencing worksheet.

6. Following these voting procedures, we returned to the courtroom and sentenced Private Loving to death.

JOHN C. NAPOLI, JR.

State of Texas )
County of Dallas )

SWORN AND SUBSCRIBED TO before me this 24 day of February, 1993.

Notary Public or Authorized Officer

BEST AVAILABLE COPY

APPENDIX C

I, Captain Thomas J. Williams, SSN . . affirm that the following is a true and correct statement of what occurred to the best of my recollection during the voting on the sentence of death in the case of Private Dwight J. Loving.

1. As a panel member in the case, I heard all of the evidence during the sentencing portion of the trial.

2. Following the closing arguments and instructions from the military judge, we adjourned to deliberate.

3. Colonel Aylor was the president of the panel and he took charge in leading the discussions. We discussed the facts and evidence in the case. Then Colonel Aylor told us that we each had two options, we could vote life imprisonment or death, but that death required a unanimous vote.

4. Following Colonel Aylor's remarks, we voted by secret written ballot. Colonel Aylor counted the ballots and the result was seven in favor of death and one in favor of life imprisonment.

5. Since there was no consensus, we discussed the facts and evidence in the case again. We did not seek help from the military judge. Instead, following our continued deliberations, Colonel Aylor instructed us to vote again. We voted using the same procedure as before, picking between death and life imprisonment. The result of the second vote was eight in favor of death and zero in favor of life. Since this vote resulted in an unanimous sentence to death, the voting ceased and the results were marked on the sentencing worksheet.

6. Following these voting procedures, we returned to the courtroom and sentenced Private Loving to death.

THOMAS J. WILLIAMS

State of Utah )
County of Utah )

SWORN AND SUBSCRIBED TO before me this 23rd day of February 1993.

Notary Public

NOTARY PUBLIC
STATE OF UTAH
ALAUNA J. DUKE





APPENDIX D

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY

November 23, 1993

The Honorable Les Aspin
Secretary of Defense
Department of Defense
Room 3E880
The Pentagon
Washington, D.C. 20301-1000

Dear Secretary Aspin:

I am writing to inquire about the adequacy of the defense services provided in death penalty cases brought against American servicemen under the Uniform Code of Military Justice.

At a time when the Congress has been devoting considerable attention to the adequacy of the defense accorded to capital defendants in state court proceedings, and with the Clinton Administration strongly supporting federal legislation to guarantee that an adequate defense is actually provided in all such cases, it seems to me especially important that the federal government provide, and be seen to provide, the expert legal assistance necessary to ensure that the death penalty will not be erroneously imposed in any court of the United States. Many if not most of the death penalty prosecutions now occurring under federal jurisdiction are brought in military courts martial. However, the military services have not, to my knowledge, adopted standards and procedures governing qualification, appointment, and training of defense counsel in such cases, nor guaranteeing the independent expert and investigative services necessary to an adequate defense.

In recent years, the Congress has been considering various proposals for comprehensive reform of habeas corpus law and procedure. Much of the impetus for this review has been provided by mounting evidence that the adjudication of death penalty cases originating in state courts has been unreasonably protracted, and at the same time that many of these cases are marred by serious factual and constitutional errors. Since 1990, the House Judiciary Subcommittee on Civil and Constitutional Rights, which I chair, has reviewed a great deal of evidence showing that the greatest single cause of both delay and error in capital cases is the systemic inadequacy in the provision of defense services.

The Honorable Les Aspin
November 23, 1993
Page 2

To get at the root of this problem, a number of legislative proposals have included thoroughgoing reforms in the way that state criminal courts appoint, train, and compensate defense counsel in the death penalty cases from the trial level onward. One of these proposals, Senator Biden's Habeas Corpus Reform Act of 1993, S. 1441, was introduced last summer with the strong support of President Clinton and the Department of Justice. This legislation would have provided very powerful incentives for the states to create special certification authorities to identify truly competent lawyers available for appointment as defense counsel in death penalty cases at the trial and post-trial stages, and would have helped to ensure that the defense in such cases was provided with the expert and investigative services necessary to ensure a fair and reliable result. Similar legislation has been introduced in the House by Judiciary Committee Chairman Jack Brooks. See Title III of H.R. 3131. While it does not appear that these habeas reform proposals will be acted on in the current session of the Congress, I think it is fair to say that a consensus is developing that whatever habeas reform legislation finally does emerge from the legislative process must include measures to improve the adequacy of defense services in state court capital proceedings.

In view of this emerging trend in habeas corpus reform, and considering the strong support of the President and the Attorney General for federal intervention to improve the level of defender services in state death penalty cases, it seems self-evident to me that the military justice system should review its performance in this area. In particular, I am concerned that

(1) defense counsel in military death penalty cases need not have the level of experience required of their civilian counterparts, Cf. 21 U.S.C. § 848(q)(5), - (6) (setting substantial minimum experience requirements for appointed counsel in federal death penalty trial and post-trial proceedings),

(2) no procedures are in place--such as a presumptive right to appointment and compensation of qualified civilian co-counsel--to provide continuity of representation,

(3) the military justice system may have failed to recognize the necessity of providing the defense with independent and highly-qualified investigative and expert services in capital cases at the trial and post-conviction levels.

I would appreciate hearing from you as to how current practice concerning the provision of defense services in death penalty cases





The Honorable Les Aspin
November 23, 1993
Page 3

within the military justice system measures up to the standards advocated for state criminal justice systems by the Administration. I look forward to working with you to ensure that in proceedings where life itself is at stake, no American serviceman or servicewoman is denied the essential tools of an adequate defense.

Sincerely,

Don Edwards

Don Edwards
Chairman
Subcommittee on Civil and
Constitutional Rights

DE:vsp

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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USCA Dkt. No. 68033/AR
CMR Dkt. No. 8901123

UNITED STATES, APPELLEE

v.

DWIGHT J. LOVING, (065-56-0228), APPELLANT

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**ORDER**

On consideration of appellant's motion to admit defense appellate exhibits GGG and HHH and petition for reconsideration of the opinion of the Court dated November 10, 1994 (41 MJ 213), it is, by the Court this 2nd day of February, 1995,

ORDERED:

That appellant's motion to admit defense appellate exhibits GGG and HHH is hereby granted;

That the petition for reconsideration regarding Issue III is granted only to the extent that the words "stated in post-trial affidavits that he" at 41 MJ 250 are deleted from the opinion of the Court; and

That in all other respects the petition for reconsideration is denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (NORRIS)
Appellate Government Counsel (GIOVANNELLI)



**APPENDIX C**

U.S. ARMY COURT OF MILITARY REVIEW

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ACMR 8901123

UNITED STATES, APPELLEE,

v.

PRIVATE DWIGHT J. LOVING, 065-56-0228,
UNITED STATES ARMY, APPELLANT.

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3 Feb. 1992
Reconsideration Denied 5 March 1992

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Accused was convicted by general court-martial, 1st Cavalry Division, S.V. Saynisch, J., of premeditated murder, felony-murder, attempted murder, and robbery, and he was sentenced to death. The United States Army Court of Military Review, De Giulio, Senior Judge, held that: (1) mistrial was not warranted by military judge characterizing as "absolutely ridiculous" accused's contention that his girlfriend was adverse witness subject to leading questions on direct examination; (2) trial counsel's argument on sentencing to vindicate society's victims was permissible; (3) failure to record defense counsel's two-minute opening statement at beginning of sentencing procedures was not substantial omission and did not change characterization of record as verbatim transcript; and (4) prosecution's peremptory challenge did not violate Fifth or Eighth Amendments, even though prosecution did not first challenge member for cause.

Affirmed.

For Appellant: Captain Emmett G. Wells, JAGC (argued), Colonel Robert B. Kirby, JAGC, Captain Ralph L. Gonzalez, JAGC, Captain James K. Lovejoy, JAGC (on brief).

For Appellee: Major Joseph C. Swetnam, JAGC (argued), Colonel Dayton M. Cramer, JAGC, Captain Timothy W. Lucas, JAGC, Captain Jonathan F. Potter, JAGC (on brief).

Before De GIULIO, HAESSIG, and ARKOW, Appellate Military Judges.

**OPINION OF THE COURT**

De GIULIO, Senior Judge:

Appellant was tried by a general court-martial composed of officers. Contrary to his pleas, he was found guilty of premeditated murder, felony murder, attempted murder, and four specifications of robbery, in violation of Articles 118, 80, and 122, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 880, and 922 (1982) [hereinafter UCMJ]. He was sentenced to death, a dishonorable discharge, and forfeiture of all pay and allowances. The convening authority approved the sentence.

Appellant asserts sixteen assignments of error and questions the appropriateness of the sentence. Several of the issues raised have been resolved by the Court of Military Appeals and will not be discussed in this opinion. See *United States v. Curtis*, 32 M.J. 252 (C.M.A.), *cert. denied*, — U.S. —, 112 S.Ct. 406, 116 L.Ed.2d 354, *remanded*, 33 M.J. 101 (C.M.A. 1991).[1] We find no error that substantially prejudices appellant, find the sentence appropriate, and affirm the findings of guilty and the sentence.

The evidence at trial, consisting of appellant's confession, eyewitness testimony (except for the two murders), physical evi-

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[1] *Curtis* was decided after the original brief and assignment of errors on behalf of appellant were filed with this Court.



dence, and other corroborating evidence unequivocally established appellant's criminal conduct on 11-13 December 1988. In December 1988, appellant purchased a .22-caliber pistol from another solider. After the purchase, appellant said the pistol made him feel like "I was big . . . and nobody mess with me no more." Despondent over what he perceived as a deteriorating relationship with his girlfriend and his lack of money to buy her Christmas presents, appellant decided to rob stores. On the evening of 11 December 1988, he entered and robbed at gunpoint a 7-Eleven convenience store in Killeen, Texas. During the course of the robbery, he fired two shots into the counter and soda fountain, which were behind the cashier. He obtained approximately $38.00 from this robbery. Among the currency obtained by appellant was a bill from which the serial number had been recorded by the store.

About an hour later, appellant entered another 7-Eleven store in Killeen, produced a pistol, and demanded money. When the cash register made beeping noises during the cashier's attempts to open it, appellant fired a bullet into the register. Appellant then pointed the pistol at the cashier and demanded she put the money in a paper bag. He grabbed the bag and ran out of the store, firing a round back into the store as he departed. Appellant took approximately $52.00 during this robbery. The serial number from one of the bills obtained by appellant had also been recorded by the store.

Dissatisfied with the meager amount of money he had obtained from the 7-Eleven robberies, appellant made the intentional and considered decision to rob taxicab drivers. On the night of 12 December 1988, appellant called for a taxicab to take him from a grocery store in Killeen to his barracks at Fort Hood. The driver of the taxicab was an Army private who was moonlighting for extra money. After entering the taxicab and after arriving at Fort Hood, appellant directed the driver to park in a dark secluded area behind the barracks. He produced a pis-

tol, held the pistol to the driver's head, ordered the driver to shut off the car's motor and lights, and demanded all the driver's money. After replying "bullshit" to the driver's protests that he had surrendered all of the money, appellant shot the driver in the back of the head. While looking at the hole in the back of the victim's head and the blood "gushing out," appellant cocked the pistol and shot him the back of the head again. The taxi driver died as a result of these gunshot wounds.

Appellant fled from the cab and went to his barracks room where he counted the money. Disappointed at the small amount of money he had obtained, appellant immediately called for a taxicab to be dispatched to Fort Hood. After entering the cab, appellant directed the driver, a retired Army sergeant, to a dark secluded street in Killeen. He pointed his pistol at the driver, told him to turn off the lights and the motor, and demanded money. The driver surrendered a grey money pouch and a red wallet. Appellant ordered the driver to lay down on the seat. He then shot the driver in the head, killing him.[2]

Later that evening, appellant took his girlfriend, Nadia, to a nightclub in Killeen. At about 0100 on 13 December 1988, a taxicab driver took appellant and Nadia to the vicinity of Nadia's house. Appellant decided to rob the taxi driver. Appellant told Nadia to go home because he was going to the store to get toilet paper or cigarettes.[3] Nadia exited the taxicab. Appellant produced a pistol and directed the driver to a dark secluded street. Appellant told the driver to shut off the lights and engine. While holding the pistol to the driver's neck, he demanded money. The driver gave him about $94.00 of cab money, his coin changer,

[2] The next day appellant threw the wallet into the garbage at his unit and the money pouch into the garbage at a local grocery store. These items were later recovered after appellant directed authorities to their location.

[3] Nadia testified appellant was to buy cigarettes. In his confession, appellant stated he was to get toilet paper. We view this discrepancy as insignificant.



and his wallet. Appellant then jerked the driver's head around and ordered him to open his mouth. Believing he was going to be killed, the taxicab driver grabbed the pistol turning it away from his head as it was fired. Appellant bit the driver's hand. In the ensuing struggle, appellant pulled the driver into the back seat, trying to get the gun away from him. The driver turned the pistol on appellant and pulled the trigger, but the pistol would not fire. Appellant told the driver that the pistol only contained blanks. The driver, still in possession of the pistol, cocked it and attepted to shoot appellant; again, the pistol would not fire. Realizing that the pistol would not fire, the driver got out of the taxicab. As the driver exited the taxicab, appellant viciously bit the driver on the head and on the back. Two of the three bites caused permanent scarring. The driver broke away and started running. As appellant pursued him, the driver "hit him in the gut" with his elbow. The driver then safely fled the scene. Appellant ran back to Nadia's house and hid the gun behind the house.

Using information from the taxicab driver, criminal investigators were able to contact Nadia who identified appellant. Appellant was apprehended. The investigators took from appellant the third driver's wallet and the two bills from the 7-Eleven stores from which the serial numbers had been recorded. Among matters seized in a consent search of Nadia's house were the pistol found wrapped in a paper bag behind the house, .22-caliber bullets which were found in a drawer with appellant's uniforms, .22-caliber bullets and casings which were found in a garbage can in the house, and appellant's bloodstained jacket.

In two confessions, one to the Army Criminal Investigation Command (CIC) agents[4] and one to the local authorities, appellant admitted the commission of each offense and described them

[4] This confession was recorded on video tape.

in detail.

Trial defense counsel attempted to paint a picture of appellant as a poor inner-city kid who was raised in a rough neighborhood without the guidance of a father. He atempted to present appellant as a soldier who performed well in the military under strong leadership but got into trouble when that leadership was absent. He attempted to portray Nadia as an immigrant who was in trouble with the Immigration and Naturalization Service, needed to get a "green card" in order to stay in the United States, and used appellant to get money for her support and to fund necessary trips to New York City to settle her immigration problems.[5] He attempted to portray Nadia as a "gang leader," who was instrumental in getting appellant to commit the offenses. In an effort to do this, appellant called Nadia as a defense witness. She testified that she was born in Milan, Italy. She went to Germany, met an American, followed him back to the United States, and married him. After they moved to New York, they separated, and she went to Killeen, Texas. Her immigration paperwork had been transferred to New York and she was having diffiiculty getting her "green card" so she could remain in the United States. She obtained a job in a bar, and her father always sent her money. She never wanted or asked for any money from appellant. Shortly after she met the appellant, he began sleeping with her at her apartment. When appellant purchased the pistol, he showed it to her. She made him remove the pistol from her house because she didn't want a gun around the house.

At the time, Nadia did not know appellant intended to rob the stores. She learned of his crimes after he had committed them.

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[5] Although not a defense to appellant's crimes, defense counsel apparently presented these matters hoping that the court members would find appellant guilty of lesser offenses to the murder specification or in an attempt to achieve less than unanimous findings of guilty of those offenses. If successful, the tactic would have avoided imposition of the death penalty.



At the request of appellant, she borrowed a friend's car and drove him to the vicinity of the two 7-Eleven stores which appellant robbed. Appellant made Nadia park some distance from the stores where she could not see them. On these occasions, she did not know where he had gone. Later, they used money provided by appellant too buy cocaine which they used. At some point, he told her that he had killed people to get money and showed her a red wallet, a zipper bag, and money. She did not believe him.

On the night of 12 December appellant and Nadia went to the Nubia Temple club where appellant had a jealous confrontaton with another man over her. After appellant challenged the man to fight, a pistol fell out of appellant's pocket and discharged. Appellant and Nadia then left the club and took a taxicab, stopping at a 7-Eleven on the way to her apartment. When they neared her apartment, appellant stated he had forgotten her cigarettes and told her he would get them. At that time she noticed he had the pistol between his legs. Nadia got out of the taxicab and asked appellant to go with her. He refused. She walked home. He departed in the taxicab, returning a short time later. Later, she was approached by investigative agents and identified appellant as her boyfriend. She consented to the search of her house. It is Nadia's testimony which is the subject of appellant's first assignment of error.

I.

Appellant asserts that the military judge improperly denied appellant's request to provide an accomplice testimony instruction regarding the testimony of Nadia. Appellant contends that:

> Although the instruction may not have gained appellant a finding of not guilty to any of the charges, the panel members' perception and understanding of Nadia's impact on appellant's actions were vital to appellant's ultimate goal on sentencing to prove to the members that he does not deserve to die for his crimes.

> The entire defense case relied upon its ability to demonstrate that appellant was motivated and encouraged to commit those offenses by Nadia. By denying appellant's request for an accomplice instruction, the military judge effectively derailed appellant's entire theory of defense with respect to the ultimate issue of whether appellant deserves to die for his offenses.

The test to be applied in determining if a witness is an accomplice is whether the witness could be convicted of the same crime for which the accused is being prosecuted. *United States v. McKinnie*, 32 M.J. 141, 143 (C.M.A. 191); *United States v. Scoles*, 33 C.M.R. 226, 231 (C.M.A. 1963). At trial, appellant's counsel requested an accomplice instruction as to Nadia. He pointed to her personal relationship to appellant, her need for money, her driving the car to the vicinity of the 7-Eleven stores, the physical evidence found at her home, and letters sent to appellant while he was confined which defense counsel claimed tended to suggest that she wished him to hide her involvement.[6] This Court views the evidence as the military judge did. Appellant's confession and Nadia's testimony show that Nadia did not know of the crimes until after they were committed. Even then, she did not believe appellant committed them. The evidence presented at trial does not implicate her in the crimes. There is no basis to charge her with any of them,[7] let alone convict her of them. *See McKinnie*, 32 M.J. at 143. The military judge's denial of the request for the accomplice instruction was correct.

II.

A part of appellant's second assignment of error also arises

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[6] The referenced letters are merely love letters. It takes great imagination to give them this sinister interpretation.

[7] Upon cross-examination by trial defense counsel, a local policeman testified that there was no evidence upon which to charge Nadia and that no charges had been filed against her.



from Nadia's testimony. Appellant alleges, in general, that the military judge's failure to grant appellant's motion for mistrial for cumulative error deprived him of a fair and impartial proceeding. Appellant divides this assertion into two parts: that the military judge failed to recuse himself for bias against appellant upon defense motion, and that the military judge failed to grant a motion for mistrial based upon an allegation that he commented upon the viability of the defense theory of the case in front of the members. These will be discussed in inverse order.

The defense contention at trial was that Nadia was a manipulative sinister force who directed appellant's criminal activities; or, in the alternative, her presence and influence over appellant and the overall circumstances of the offenses were such as not to warrant capital punishent of appellant. In an attempt to establish a basis for this theory, Nadia was called by the defense. In his direct examination of Nadia, trial defense counsel used leading questions. Eventually, trial counsel objected and that objection was sustained. Trial defense counsel contended that Nadia was an adverse witness because she provided information against appellant, and therefore the defense should be able to ask leading questions.[8] Even though the military judge cautioned trial defense counsel not to lead his witness, counsel continued to do so throughout Nadia's testimony. Only when trial counsel again objected did the military judge direct that leading questions not be asked. After trial defense counsel was told several times that the witness was not hostile and not to lead the witness, the following colloquy occurred before the court members:

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[8] This information appears to have been her statement to investigators that appellant was her boyfriend, and that he was a passenger in the taxicab. It is evident from the record that Nadia was reluctant to implicate appellant. She provided those statements to police each containing more information relating to appellant's criminal conduct. It is clear that she did what she could to protect appellant without getting herself into trouble.

DC: Your Honor, I would, again, request the Court's permission to allow me to cross-examine this witness, she is clearly adverse to my client—

MJ: No—absolutely ridiculous. Proceed. . . .

DC: Your Honor, I would like to ask the following questions, to prove that this—at least, from the government's position—is the key witness against my client. The testimony that I seek to elicit from her is that they told her that she was the key witness in the case against Dwight Loving; which makes her—in the defense view—an adverse witness to my client.

MJ: I told you that was ridiculous, before. How many times have I gotta tell you it's ridiculous? The objection is sustained.

DC: Yes, sir.

MJ: Don't challenge me.

DC: Yes, sir. We will—we would like to submit a written brief, on this, at a later date, if we could, to make sure that we note all the objections we have.

MJ: No.

DC: No.

MJ: You've entered your objections—

DC: Alright—

MJ: —I have listened to your objections—three or four times—I have sustained; and, you're not going to ask any leading questions.

DC: Yes, Sir.

MJ: So, please, drive on.

DC: We feel this—

MJ: You open your mouth about it, again, counsel, and I'm going to clear the courtroom and we're going to have a discussion.



Subsequently, in an Article 39(a) session, after again litigating whether Nadia was an adverse witness, trial defense counsel objected to the military judge's response before the court members as "possibly prejudicial." Defense counsel moved for a mistrial on the basis that Nadia was a key witness to the defense and that the military judge's comments concerning the defense contention that she was an adverse witness as "ridiculous" and "absolutely ridiculous" prejudiced appellant and denied him a fair trial. The military judge denied the motion. He agreed with trial counsel that an instruction could cure any possible error. The military judge offered to provide a curative instruction to the court members in appropriate language fashioned by the defense. Defense objected to an instruction because it would be a "red flag" to the court members. Based upon defense desires, the military judge did not immediately instruct the court to disregard any comments but determined that he would give the members a general instruction to disregard any of his comments, statements, and gestures which would seem to indicate an opinion on the guilt or innocence of the accused.

A mistrial is a drastic remedy and should be granted only when manifestly necessary to preserve the ends of justice. *United States v. Garrett*, 24 M.J. 418, 417 (C.M.A. 1987); *United States v. Jeanbaptiste*, 5 M.J. 374 (C.M.A. 1978). Whether to grant a mistrial is within the discretion of the military judge, and his decision will not be disturbed unless there is a clear abuse of discretion. *United States v. Rushatz*, 31 M.J. 450, 457 (C.M.A. 1990); *Jeanbaptiste*, 5 M.J. at 376. "Giving a curative instruction, rather than declaring a mistrial, is the preferred remedy for curing error when the court members have heard inadmissible evidence, as long as the curative instruction avoids prejudice to the accused." *United States v. Balagna*, 33 M.J. 54, 56 (C.M.A. 1991) (citing *United States v. Evans*, 27 M.J. 34, 39 (C.M.A. 1988), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 797, 102 L.Ed.2d 788 (1989) ).

In the case before us, an immediate instruction would have cured any possible error.[9] The military judge offered to give an immediate instruction to disregard his comments, but at appellant's request, did not do so. By requesting that no instruction be given, appellant waived the issue. *See United States v. Wray*, 9 M.J. 361 (C.M.A. 1980). Notwithhstanding the appellant's waiver, later, during instructions before findings, th military judge instructed the court members to disregard his comments, statements or gestures. "Absent evidence to the contrary, a jury is presumed to have complied with the judge's instruction." *Balagna*, 33 M.J. at 56-57 (citations omitted). The military judge did not abuse his discretion in deying a mistrial.

Appellant also alleges that a mistrial should have been granted because the military judge failed to recuse himself upon motion of defense for bias against appellant. This issue arose from appellant's request for expert psychiatric assistance. A Lieutenant Colonal (Dr.) W had been provided by the goverment, but defense contended he was inadequate. At an *ex parte* proceeding conducted with consent of the trial counsel, defense counsel disclosed to the military judge that Dr. W was inadequate because he refused to be a defense advocate, believed he should be neutral in providing advice to appellant, and felt that appellant was "the sort of person you might want to execute." The military judge took steps to insure that appellant was provided an acceptable psychiatrist. Finally, Dr. Armitage, a forensic psychiatrist acceptable to the defense, was made available. During this

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[9] We doubt that the judge's conduct was error. This is not a case, such as *United States v. Wilson*, 2 M.J. 548 (A.C.M.R. 1976), a case cited by appellant, where the military judge essentially tried the case for the prosecution. Military judges should take care not to voice their frustrations, such as the military judge did here, when counsel repeatedly raise objections to matters upon which the military judge has already ruled.



process the following colloquy concerning trial dates and accountability for delays took place:

> TC: Your Honor, we're not—
> MJ: Well, look—
> TC: —opposing a defense delay, but I get the feeling that the government is being maneuvered here into somehow the defense saying, 'I'm not ready to go, we're going to need to evaluate a lot of different things; but somehow, it should all be accountable to the government.' And if it happens 90 days fall by, try to create an issue where there is no issue.
> MJ: Well, that's my perception exactly. Certainly, you fellows aren't trying to maneuver the system, are you? If you want delay, I'd be more than happy to give you delay. If you want time to check out these things, be my guest; take whatever time you feel is necessary. But in my view so far, the government has been extremely cooperative with you. If you want more time, as I say, just ask.[10]

Subsequently, the appellant challenged the military judge for

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[10] There was some confusion whether the military judge made comments at an Article 39(a), UCMJ, session or at an out of court session pursuant to Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 802 [hereinafter R.C.M.]. Although the use of R.C.M. 802 sessions has been expanded, the potential dangers of such sessions are exhibited by this case. Except for purely administrative matters, the use of R.C.M. 802 sessions should be discouraged. Matters which have even a remote possibility of becoming an appellate issue should be litigated on the record. In the case before us, appellant alleges statements made by the military judge at the 802 sessions exhibited his bias and prejudice against defense counsel. We have concluded from the record that those comments questioned by appellant took place at an Article 39(a) session and are part of the record of trial.

cause, bias, and prejudice against counsel for the defense. The military judge denied the motion.

Appellant urges the application of the liberal standard applied to challenge of court members to the challenge of the military judge. We believe we should apply a different standard. There is a substantial burden on the defendant to prove that a judge is not impartial. *United States v. Martinez,* 19 M.J. 652 (A.C.M.R. 1984). "A 'judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true.' " *Martinez,* 19 M.J. at 653 (citing *United States v. Bray,* 546 F.2d 851, 857 (10th Cir. 1976) ). In the case before us, we find that the military judge was impartial and was not biased toward defense counsel. Indeed, he insured appellant had an acceptable expert and made many rulings in favor of appellant. We do not interpret his question of "Certainly, you fellows aren't trying to maneuver the system, are you?" as any indication of bias or, as contended by the defense; as an attack upon counsel's ethical conduct. *See United States v. Elzy,* 25 M.J. 416 (C.M.A. 1988). We find no abuse of discretion and no error in the refusal of the military judge to grant appellant's challenge against him.

We find no cumulative error to support appellant's contention that failure to grant the motion resulted in an unfair trial. We hold that the military judge did not abuse his discreton in denying the motion for a mistrial. *See Jeanbaptiste,* 5 M.J. at 376.

**III.**

Appellant submits that the military judge erred in failing to grant a motion for change of venue because of media coverage; or, in the alternative the military judge erred in failing to sequester the panel members. At trial, appellant requested a change of venue to a place such as Fort Huachuca, Arizona, because the case received state and notional publicity. In denying the motion the military judge made the following findings:



> One, the press has reported fairly and responsibly on this trial. Two, the stories have not created a shrill or hostile atmosphere for this trial. Three, the stories for the most part have been accurate, with a few minor exceptions cited by the defense. Any racial issues have not be injected by the press. Nevertheless, efforts have been made to ensure that the court members, named in the orders, have as little exposure to pretrial publicity as possible. Those efforts have included: One, obtaining members not assigned to the 1st . . . Cavalry Division. Two, obtaining members assigned to Fort Hood well after the dates of the alleged incidents. Three, obtaining members from Fort Sill, Oklahoma, an installation hundreds of miles from Fort Hood. Four, an order issued by me on 31 January 1989, directing potential members to refrain from reading, listening to, or viewing any accounts of this trial, or the alleged incidents involved. And five, a previous ruling, allowing individually-sequestered voir dire.

After extensive voir dire of court-members, to include the issue of pretrial publicity and prior knowledge, nine members indicated they saw one newspaper article concerning the offense and five indicated they had seen references to the case on television. After the extensive voir dire, no reason was disclosed upon which to base a challenge for cause. Indeed, none of the members were challenged for cause by appellant because of media publicity or knowledge of the case.

Where an accused can demonstrate that the court would be adversely influenced by an atmosphere of hostility or partiality against him at place of trial, he is entitled to be tried in a different place. *United States v. Nivens,* 45 C.M.R. 194, 197 (C.M.A. 1972). "A change in the place of trial may be necessary when there exists so great a prejudice against the accused that he cannot obtain a fair and impartial trial." R.C.M. 906(b)(11) discus-

sion. As stated in *United States v. Smith*, 1 M.J. 1204, 1207-08 (N.C.M.R. 1977),

> Proof that a particular case has been widely publicized, standing by itself does not establish that a court-martial has been influenced by such publicity. Further, the mere fact that court-martial members have heard or read about the case they are assigned to try, standing alone, is not a sufficient basis for a change of venue so long as the members will not be influenced by what they have heard or read.

(citations omitted):

In the case before us, we find that there was no atmosphere of hostility surrounding the court-martial. Further, the military judge took appropriate measures to ensure the members remained free from possible external influence. As a result, we are satisfied that the court members decided the case based upon what was properly presented to them during the trial. *See United States v. Garwood*, 20 M.J. 148, 152 (C.M.A.), *cert. denied;* 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 456 (1985). We find that appellant was tried by a fair and impartial court. The military judge properly denied the motions for change of venue and sequestration of the members.

IV.

Appellant asserts that the military judge improperly denied a defense motion to have the members ignore a portion of the government argument requesting that the members vindicate society's victims. Appellant's objection relates to the following argument by trial counsel on sentence:

> What the defense has glossed over in their entire argument is justice. What sentence serves justice? Crimes, when they're committed, demand punishments that fit them. The message that you send out, and you will



> send out a message with your sentence today, that message is not going to go just over this installation, but it is going to go across the United States. There's going to be a message that's going to be heard by working people. They need to know that they will not be terrorized in their work places. Americans, members of society, need to know that they will be protected and that they will be protected and that we will protect and we will vindicate society's victims.

Trial defense counsel objected to the argument. The military judge overruled the objection. The military judge instructed the court to consider evidence in aggravation and mitigation. He also instructed the court on the sentencing factors of protection of society from the wrongdoer, punishment of the wrongdoer, rehabilitation of the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his crime. Trial defense counsel objected to the instruction claiming specific deterrences should be prohibited.

Before this Court, appellant contends that trial counsel improperly argued general deterrence, citing *United States v. Mosely*, 1 M.J. 350 (C.M.A. 1976). In *Mosely*, Judge Cook, writing for the Court, held that, "as applied to the accused, therefore, consideration of [specific] deterrence in assessment of a just sentence is consistent with the concept that the sentence should be individualized, that is, predicated on factors relevant to the accused." *Id.* at 351. He held, however, that it was error for the trial counsel to argue general deterrence. *Id.* The court withdrew from this view in *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980). The Court held that general deterrence is a relevant factor in determining a just sentence within the maximum limits prescribed and can be argued by the trial counsel, provided the military judge instructs the court there are other factors such as rehabilitation of the accused, and admonishes the

court members that they must take into account the circumstances of the case and the character and propensities of the accused.[11] *Id.* at 104.

In the case before us, tthe military judge properly instructed the court members to take into account the circumstances of the case and the character and propensities of the accused. The trial counsel's argument did not invite the members to rely on deterrence to the exclusion of other factors. *See United States v. Thompson*, 9 M.J. 166 (1980). The trial counsel's argument was not improper. The military judge correctly overruled the objection.

V.

Appellant asserts that the record before us is insufficient to satisfy the requirement for a verbatim record.

At trial, the military judge gratuitously invited trial defense counsel to make an opening satement during the sentencing proceedings.[12] The court recessed before the "opening statement"

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[11] Judge Cook, who authored *Mosley*, concurred in the disposition of *Lania*. In his concurrence he stated:

> I have expressed that view in a number of cases, but see no purpose in continuing its reiteration in the face of the Court's withdrawal from *United States v. Mosely*, 1 M.J. 350 (C.M.A. 1976). I therefore, do not now, and will not henceforth, raise objection to arguments by trial counsel for a more severe sentence than might otherwise be adjudged because increased severity may be thought, by the court members, to deter others from committing the same offense.

*Lania*, 9 M.J. at 105.

[12] Military criminal trials are bifurcated, i.e., a proceeding before findings of guilty or verdict and a presentencing proceeding. Although an opening statement is normal at the beginning of trial on the merits, this Court is unaware of any other military case where an opening statement was permitted during presentencing proceedings. We need not determine the propriety of adding this additional but unrequested opening statement. In our view, however, the better practice is to follow established procedure.



could be presented by the trial defense counsel. The court was called to order and the "opening statement" on sentencing was presented. Trial defense counsel requested a sidebar conference and this colloquy followed:

> DC: Your Honor, the tape didn't—didn't catch the opening statement part—
> RPTR: I was in the restroom, Your Honor. I didn't know—
> MJ: What?
> DC: He was in the restroom, so he didn't get that. But it was—it was short—we don't think there was any error in that. It was a very short statement, and we don't see that as any serious error, but I thought we ought to bring it up at this time.
> MJ: I didn't even notice.
> DC: I didn't either.
> MJ: Don't do that again, will you?
> RPTR: I just went to the bathroom, and—
> MJ: Yeah, I know, but don't do it again.
> DC: I just thought we ought to do—say something on the record.
> DC: I can recreate it verbatim, almost, and that—to the defense's satisfaction, Your Honor.
> DC: Yeah.

The record reflects that the court reporter was absent two minutes. Trial defense counsel provided a text of his opening statement in writing which is attached to the record as an appellate exibit.

Appellant urges that this Court adopt a bright line rule requiring a verbatim record such as that adopted by the Navy court in *United States v. Alston*, 30 M.J. 969 (N.M.C.M.R. 1990). The facts of *Alston* are far from the facts in the case before us. In *Alston*, only those parts of the record pertaining to the offense

of which appellant was convicted were transcribed. Government counsel maintained that the other parts were insubstantial. The court held that the record was not verbatim. *Id.* at 971.

A record of trial in a case such as the one before us must include a verbatim transcript of all sessions except sessions closed for deliberations and voting. *See* R.C.M. 1103(b)(2)(B). "A verbatim transcript includes sidebar conferences, arguments of counsel, and rulings and instruction by the military judge." R.C.M. 1103(b)(2)(B) discussion. Failure to comply with the rule does not necessarily require reversal but raises a presumption of prejudice which the government may rebut. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1103(b)(2) analysis, app. 21, at A21-70. *See United States v. Eichenlaub,* 11 M.J. 239 (C.M.A. 1981). An omission must be substantial to raise the presumption. *United States v. Gray,* 7 M.J. 296, 297 (C.M.A. 1979); *see United States v. Nelson,* 13 C.M.R. 38 (C.M.A. 1953). Conversely, insubstantial omissions do not change a record's characterization as a verbatim transcript. *United States v. McCullah,* 11 M.J. 234, 236 (C.M.A. 1981); *United States v. Donati,* 34 C.M.R. 15 (C.M.A. 1963). Therefore, reconstruction by trial counsel without defense participation of twenty-four pages of the testimony from five defense witnesses and proceedings on a motion for mistrial which originally consisted of about eighty pages has been held to be a substantial omission. *United States v. Boxdale,* 47 C.M.R. 351 (C.M.A. 1973). On the other hand, reconstruction of a prosecution witness' testimony at an Article 39(a) session with all parties present has been held to be sufficient. *United States v. Lashley,* 14 M.J. 7 (C.M.A. 1982).

In the case before us, we find that the omission of a two-minute opening statement at the beginning of the sentencing procedures by trial defense counsel was not substantial. Trial defense counsel continued to present his evidence and placed his position concerning sentencing before the court during argument.



Even assuming the omission was substantial, trial defense counsel's assurance to the military judge that he could reconstruct his statement "verbatim almost," and his reconstruction, which is attached to the record as an appellate exhibit, convinces this Court that the record is substantially verbatim. The requirements of the Manual for Courts-Martial and the Uniform Code of Military Justice have been satisfied and any possible presumption of prejudice has been overcome. *See Lashley,* 14 M.J. at 9.

**VI.**

Appellant alleges that the death penalty provision of Article 118, UCMJ, is unconstitutional as it relates to traditional common law crimes that occur in the United States during time of peace. Appellant's claim is that the death penalty provision of Article 118 is an improper invasion of state interests protected by the tenth amendment to the Constitution and exceeds the requirements of the necessary and proper clause. The constitutionality of the peacetime prosecution of offenses under the military murder statute was upheld in *United States v. Schafer,* 32 C.M.R. 83 (C.M.A. 1962). We believe the reasoning in *Schafer* is similarly applicable to this case:

> Thus, in the case of an accused serving in the armed forces, there is no merit to the defense argument insofar as it is predicated on drawing a distinction as to peacetime offenses. *See also Ex parte Milligan* [71U.S.] 4 Wall. 2, 124, 141, [18 L.Ed. 281] (U.S. 1866). And neither, of course, can the locus of the crime, nor the penalty therefor, make any difference, for those amenable to military justice under Article 2 of the Code, 10 U.S.C. § 802, are subject thereto in all places under the clear extraterritorial applicability prescribed for the Uniform Code in Article 5 thereof, 10 U.S.C. § 805. As the Supreme Court of the United

States recently held in *Kinsella v. United States*, 361 U.S. 234, 4 L.Ed.2d 268, 80 S.Ct. 297 (1960):

"The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'

. . . .

'[T]he power to 'make Rules for the Government and Regulation of the land and naval Forces' bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of the punishment therefor. If . . . [the accused] are included in the term 'land and naval Forces' at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses.'[13]

*Shafer*, 32 C.M.R. at 85-86.

The assertion of error is without merit.

**VII.**

Appellant challenges the peremptory challenge procedure in the military justice system, contending that it allows the government to remove any one juror without cause and constitutes an unconstitutional violation of the fifth and eighth amendments in capital cases. Appellant further contends that a premptory challenge permits the prosecutor to remove a member whose moral bias against the death penalty does not justify a challenge for cause. Although appellant makes this broad assertion, his argument is not directed at death penalty cases specifically, but at the peremptory challenge procedure in general. He contends that the convening authority selects the "best qualified" to sit as court

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[13] This view has been reinforced by *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987).



members and that the one peremptory challenge is to remove any lingering doubt about a member's fitness to serve. Appellant uses as an example a situation where a defense challenge for cause is denied and the issue is closely decided. He contends that only then is a peremptory challenge proper. But where a peremptory challenge is made by the government without first challenging the member for cause, he contends no valid basis exists for the member's removal from the court. Appellant cites no authority for the unique conclusion.

Article 41(b), UCMJ, provides that "Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause." No reason is necessary for a peremptory challenge. R.C.M. 912(g)(1) discussion.[14]

At common law, unlimited peremptory challenges were exercised by the Crown and the defendant was allowed a limited number.[15] Originally, peremptory challenges may have been allowed only in capital felonies. *See Swain*, 380 U.S. at 212 n. 9, 85 S.Ct. at 831 n. 9. "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that the peremptory challenge is a necessary part of trial by jury." *Swain*, 380 U.S. at 219, 85 S.Ct. at 835. It has been said that the peremptory challenge is an arbitrary and capricious right which must be exercised with full freedom or it fails in its purpose. *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). "Although historically the incidence of the prosecutor's challenges has differed from that of the accused,

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[14] This provision has been limited by *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989); *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).

[15] For a history of the peremptory challenge see *Swain v. Alabama*, 380 U.S. 202, 212-217, 85 S.Ct. 824, 831-834, 13 L.Ed.2d 759 (1965). In citing *Swain*, we recognize the limitations placed upon the case by *Batson*.

the view in this country has been that the system should guarantee not only freedom from any bias against the accused, but also from prejudice against the prosecution." *Swain*, 380 U.S. at 220, 85 S.Ct. at 835. In the case before us, we find that the trial counsel's peremptory challenge served that very purpose. We hold that the prosecution's peremptory challenge did not violate the Constitution.[16]

**VIII.**

Appellant next asserts that R.C.M. 1004 violates his fifth amendment right to equal protection by subjecting him to the death penalty for an offense which is not punishable by death under the federal criminal code. This Court addressed this issue in *United States v. Murphy*, 30 M.J. 1040, 1055-1056 (A.C.M.R. 1990) (en banc), holding that an accused was not deprived of equal protection by virtue of his status in the armed forces. We see no valid reason to reject our prior holding on this issue. Appellant's assertion of error is without merit.

**IX.**

Appellant contends that due process requires that trial and intermediate appellate judges in a peacetime military death case have the protection of a fixed term of office.

No published case by this Court has addressed this issue.[17] In

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[16] In *Hayes v. Missouri*, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 (1887), the Supreme Court rejected a constitutional challenge under the equal protection clause to the prosection's peremptory challenge. The Court stated, "The right to challenge is the right to reject, not select a juror. If from those who remain, an impartial jury is obtained, the constitutional right of an accused is maintained.' *Id.* at 71, 7 S.Ct. at 352. In the case before us, adopting appellant's contention would provide him a partial court—partial in his favor.

[17] The issue of fixed terms of office has been addressed by this Court in an unpublished opinion, which held there was no requirement for a fixed term for judges in the military and thus no due process violation. *United States v. Durham*, CM 446440 (A.C.M.R. 1986) (unpub.), *petition denied*, 24 M.J. 126 (C.M.A. 1987). The Navy-Marine Corps Court of Military Review has subsequently reached the same conclusion. *United States v. Graf*, 32 M.J. 809 (N.M.C.M.R. 1990).



obiter dictm, the Supreme Court stated in *Palmore v. United States*, 411 U.S. 389, 404, 93 S.Ct. 1670, 1679, 36 L.Ed.2d 342 (1973):

> Under its . . . power '[t]o make Rules for the Government and Regulation of the land and naval Forces,' Congress has declared certain behavior by members of the Armed Forces to be criminal and provided for the trial of such cases by court-martial proceedings in the military mode, not by courts ordained and established under Article III. Within their proper sphere, courts-martial are constituted to carry out congressional and executive will. *Dynes v. Hoover*, [61 U.S.] 20 How. 65, 79, 82 [15 L.Ed. 838] (1857). . . . [T]he Constitution does not provide life tenure for those performing judicial functions in military trials. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 76 S.Ct. 1, 5 100 L.Ed. 8 (1955).

Although the establishment of a fixed term of office for those performing military judicial functions may be desirable, it is not a Constitutional requirement, but is a policy matter to be determined by the President, Congress, or each military service.

**X.**

Upon sentencing appellant, the court members unanimously found the following three aggravating factors:

> The premeditated murder of Bobby Gene Sharbino was comitted while the accused was engaged in the com-

mission or attempted commission of a robbery.

Having been found guilty of the felony murder of Christopher Fay, as set forth in Specification 3 of Charge I, the accused was the actual perpetrator of the killing.

Having been found guilty of premeditated murder of Bobby Gene Sharbino, the accused was also found guilty of another violation of Article 118, UCMJ, in the same case.

The court members also announced that they unanimously found any extenuating and mitigating circumstances were substantially outweighed by any aggravating circumstances. Accordingly they sentenced appellant, *inter alia,* to be put to death.

In accordance with our obligation under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we have independently weighed the evidence and agree with each of the aggravating factors found by the court-martial, i.e., that the premeditated murder of Bobby Gene Sharbino, in violation of Article 118(1), UCMJ, was committed while appellant was engaged in a robbery (R.C.M. 1004(c)(7)(B)); that in the felony murder of Christopher Fay, a violation of Article 118(4), the appellant was the actual perpetrator of the killing (R.C.M. 1004 (c)(8)); and that appellant was found guilty in the same case of another violation of Article 118 (R.C.M. 1004 (c)(7)(J)). We find that each aggravating factor in this case, standing alone, is sufficient to authorize the death penalty. *United States v. Curtis,* 33 M.J. 101, 108 (C.M.A. 1990). Accordingly, we do not find that the number of aggravating factors affected the court members willingness to impose the death sentence. *See id.* We also find that any extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances.

In accordance with *Curtis,* we are required to conduct a limited proportionality review using *generally* similar cases reviewed by the Supreme Court of the United States in which state courts



have imposed the death penalty for like crimes. 33 M.J. at 109. We have examined a number of those cases and have concluded that the sentence is generally proportional to those imposed by other jurisdictions in similar situatons.[18] We also conclude that the sentence is appropriate for the crimes of which the accused stands convicted.

## XI.

In a supplemental assignment of error, appellant alleges that the military judge erred in not permitting him to plead guilty or enter into a confessional stipulation to the robberies of the murder victims. A reading of the record reveals that appellant raised this issue in motions regarding referral of the charges to trial and multiplicity. In regard to the multiplicity motion, appellant initially offered to admit to the fact in an attempt to counter trial counsel's argument that exingencies of proof required multiplicious pleading. Subsequently, appellant decided, however, "to hold our water" on the offer. In regard to the confessional stipulation, that issue became moot when trial counsel steadfastly refused to enter into such a stipulation. The question of whether appellant could plead guilty was also discussed just prior to pleas. The cause of this discussion was case law which held that, under Article 45(a), UCMJ, 10 U.S.C. § 845(a),[19] an accused could

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[18] A computer search was used to examine cases reviewed by the Supreme Court since the reinstatement of the death penalty following *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Among the cases examined were *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990); and *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

[19] Article 45(a), UCMJ, precludes an accused from entering a plea of guilty to any offense for which the death penalty may be adjudged.

not plead guilty to robbery and unpremeditated murder, even when charged in separate specifications and even when felony murder was not charged. *See United States v. Dock*, 28 M.J. 117, 118 (C.M.A. 1989).

Unlike *Dock*, appellant here complains he was precluded from pleading guilty. A reading of the record reveals that appellant did not attempt to enter pleas of guilty to any offense. Although he could have entered pleas of guilty to some offenses, he elected not to do so, as was his right. It appears from the record that appellant's strategy at trial was to plead not guilty, put the goverment to its proof, and attempt to shift the blame for the offenses to Nadia. Appellant's complaint at trial seemed to have been that he was deprived on sentencing of the instruction that a plea of guilty is the first step toward rehabilitation. Addressing this issue, the military judge offered to instruct the court that appellant was precluded from pleading guilty to capital offenses by law. Appellant assented to the offer, *sub silentio*. The military judge so instructed the court. Appellant must have been satisfied with the instruction because he did not object to it. Having selected this strategy, appellant should not be heard to complain of it. Even assuming error, appellant was not prejudiced, for he received the best of both worlds—he pleaded not guilty and the members received an instruction which left the impression that he really wanted to plead guilty but could not because of the law. We find the assignment of error without merit.

Other assertions of error, to include those raised personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), are without merit. The findings of guilty and the sentence are affirmed.

Judges HAESSIG and ARKOW, concur.



**APPENDIX D**

U.S. ARMY COURT OF MILITARY REVIEW

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ACMR 8901123

UNITED STATES, APPELLEE,

v.

PRIVATE E1 DWIGHT J. LOVING, 065-56-0228,
UNITED STATES ARMY, APPELLANT.

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15 April, 1992

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Accused was convicted by general court-martial, S.V. Saynisch, J., of premeditated murder, felony-murder, attempted murder, and robbery. On reconsideration of prior decision, 34 M.J. 956, the United States Army Court of Military Review, De Giulio, Senior Judge, held that: (1) accused was not denied effective assistance of appellate counsel; (2) trial defense counsel's decision not to present voluntary intoxication or lack of mental responsibility defense was matter of trial strategy; and (3) accused had no right to appellate defense counsel of particular rank.

Petition for reconsideration denied.

For Appellant: Captain Emmett G. Wells, JAGC (argued), Captain James M. Heaton, JAGC (on brief).

For Appellee: Major Joseph C. Swetnam, JAGC (argued), Lieutenant Colonel Daniel J. Dell'Orto, JAGC (on brief).

Before De GIULIO, HAESSIG, and ARKOW, Appellate Military Judges.

**OPINION OF THE COURT ON PETITION FOR RECONSIDERATION**

De GIULIO, Senior Judge:

Appellant was tried by a general court-martial composed of officers. Contrary to his pleas, he was found guilty of premeditated murder, felony murder, atempted murder, and four specifications of robbery, in violation of Articles 118, 80, and 122, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 880, and 922 (1982) [hereinafter UCMJ]. He was sentenced to death, a dishonorable discharge, and forfeiture of all pay and allowances. On 3 February 1992, this court issued an opinion affirming the findings of guilty and the sentence. *United States v. Loving*, 34 M.J. 956 (A.C.M.R. 1992).

On 24 February 1992, appellantt filed a Petition for Reconsideration and Suggestion for Reconsideration *En Banc*. In that document, it is asserted that the proportionality review in this Court's opinion of 3 February 1992 should be reconsidered, that appellant was denied effective assistance of appellate counsel, and that appellant was denied equal protection of the law. On 24 February 1992, appellant also moved to file a second supplemental assignment of error.[1] In this supplement, appellant asserts that trial defense counsel were ineffective in failing to present the defense of voluntary intoxication and in failing to present evidence on the merits or at sentencing concerning appellant's mental condition. The second supplemental assignment of error was considered by this Court when deciding whether the Suggestion for Reconsideration *En Banc* should be adopted. Appellant's Suggestion for Reconsideration *En Banc* was not adopted by the Court. *United States v. Loving*, ACMR 8901123 (A.C.M.R. 5 Mar. 1992) (notice) (unpub).

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[1] The first Supplemental Assignment of Error was considered in this Court's opinion of 3 February 1992.



Now before this panel for disposition are the assertions made in the Petition for Reconsideration and the second Supplemental Assignment of Error. We treat all assertions of error as part of the Petition for Reconsideration. We find no merit to the assertions and deny the petition.

I.

Pursuant to *United States v. Curtis*, 33 M.J. 101, 109 (C.M.A.), *modifying* 32 M.J. 252, 271 (C.M.A. 1991), this Court conducted a proportionality review of the death penalty imposed in appellant's case. 34 M.J. at 969. Appellant asserts that this Court should reconsider the proportionality review to ensure a more thorough and accurate assessment of the appropriateness of the death penalty in this case, to apprise appellant more fully of the basis of this Court's decision in order to afford him sufficient information for further appellate review, and establish standards and guidelines for proportionality review in general. We believe our proportionality review has been thorough, has been accurate, and satisfies the requirement set forth in *Curtis*.

II.

Appellate defense counsel also asserts that appellant has been denied effective assistance of appellate counsel.[2] He points to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter ABA Guidelines]. Appellate defense counsel also points to *United States v. Curtis*, 31 M.J. 395 (C.M.A. 1990) (interlocutory order), where he contends that the Court of Military

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[2] Appellate defense counsel also moved to withdraw from the case. In that motion, he noted that appellant was "advised of the implications of continued representation by [appellate defense counsel], and has no objection to such continued representation." The motion to withdraw was denied by this Court.

Appeals ordered the Navy to provide $15,000 "to secure services of death qualified counsel." This Court rejected similar claims in *United States v. Gray,* 32 M.J. 730 (A.C.M.R.), *writ appeal denied,* 34 M.J. 164 (C.M.A. 1991), holding that the ABA Guidelines are not binding on the military.[3] A similar contention concerning the position that funds were required for death qualified counsel was also rejected. *Id.* at 734.

In an affidavit submitted to this Court, appellate defense counsel states his belief that he had inadequate time to prepare for the review of appellant's case after he agreed to his assignment to the case in June 1991, that his caseload was too heavy, that he was unable to find time to attend "continued legal education of my choice on capital litigation," that he had not read the record in November 1991 when oral argument was scheduled for 9 December 1991,[4] and that he failed to raise the issue of ineffective assistance of defense counsel concerning mental responsibility.[5]

Appellate defense counsel are held to the same standard of competency as trial advocates. *United States v. Hullum,* 15 M.J. 261, 267 (C.M.A. 1983). In testing for ineffective assistance of counsel, it must be shown that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Scott,* 24 M.J. 186 (C.M.A. 1987).

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[3] A similar claim was rejected in *United States v. Thomas,* 33 M.J. 768 (N.M.C.R. 1991).

[4] It is noted that oral argument was requested by the same counsel on 29 October 1991. No request was made by counsel to delay oral argument. Counsel did not oppose, however, a request by government appellate counsel to reschedule oral argument. Government appellate counsel's request was denied.

[5] This issue has been raised before this Court and will be discussed in this opinion.



In considering this issue, we note:

1) that appellate defense counsel has represented numerous appellants before this Court, filed numerous pleadings and presented numerous oral arguments.

2) that appellate defense counsel has the reputation of being one of the most able counsel in the Army Defense Appellate Division. His practice before this Court is consistent with that reputation.

3) that in appellant's case, appellate defense counsel utilized an excellent brief. In addition, he requested oral argument, requested extension of time for oral argument, filed supplemental citations, ably argued before the Court twice, suggested reconsideration *en banc*, petitioned for reconsideration of this Court's decision, and filed two supplemental assignments of error.

4) that in his practice before this Court, appellate defense counsel has shown that his knowledge, training, and experience in military criminal law place him well within the group qualified to represent those accused of capital crimes.

We conclude that counsel's representation of appellant before this court has not been deficient. *See Strickland,* 466 U.S. 668, 104 S.Ct. 2052.

**III.**

Appellant also alleges that his trial defense counsel were ineffective because they failed to present the defense of voluntary intoxication and evidence of appellant's mental condition on the merits or at sentencing.

Affidavits submitted by the trial defense counsel[6] reveal that

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[6] At an in-chambers hearing before this Court, Government appellant counsel indicated that the lead trial defense counsel continued to assist ap-

the option of presenting voluntary intoxication was carefully considered by the defense team. Counsel concluded that such a defense was inconsistent with the evidence and their overall defense strategy. Because of the strong evidence against appellant, the defense strategy was to convince the court that the death penalty should not be imposed. Throughout the trial, the defense maintained that appellant's girlfriend manipulated him into committing the offenses. Except for appellant's prospective testimony, there was no evidence of any significant drug or alcohol abuse during the offenses. It was concluded that evidence of voluntary intoxication would have to come from appellant who in practice sessions proved to be a very poor witness. Counsel concluded that appellant's testimony would do more harm than good. In addition, the defense expert psychiatrist, a member of the defense team, was not supportive of the use of the voluntary intoxication defense. Finally, appellant decided that he would not testify.

As to appellant's mental responsibility, the affidavits reveal that the defense expert psychiatrist was extremely adverse to this defense after interviewing appellant on several occasions and reviewing all documents regarding appellant's mental status. He concluded that presentation of the defense would not be successful and would only open the door to evidence that appellant had the type of personality that could easily commit similar crimes in the future. The defense team made a concerted effort to keep this evidence from the court members believing it would encourage a capital sentence—a result their strategy was trying to avoid.

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pellant in his appeal and that he was reluctant to provide an affidavit. After this court ascertained that the allegations applied to all three trial defense counsel, counsel were released from their privilege concerning this matter. *United States v. Loving,* ACMR 8901123 (A.C.M.R. 27 Feb. 1992) (interlocutory order) (unpub). Even in his subsequentt affidavit the lead trial defense counsel continues to advance arguments in appellant's defense.



As previously stated in this opinion, the standard to be applied in testing for ineffective assistance of trial defense counsel is that set forth in *Strickland v. Washington.* Appellant must overcome the strong presumption that the challenged acts were trial strategy. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Deference must be given to counsel's tactical judgment during trial, and our judgment with the benefit of hindsight should not be substituted. *United States v. Bono,* 26 M.J. 240, 242 (C.M.A. 1988).

In the case before us, counsels' conduct of the defense was carefully planned. It was developed after considering input from the defense expert psychiatrist who examined the appellant, provided the defense team the benefit of his professional judgment, participated in trial preparations, and sat at the defense table at trial. It is clear to this Court that the determination not to present appellant's mental condition on either findings or sentence was carefully considered tactics and strategy. Giving deference to trial defense counsels' tactical judgment, we hold that their performance was not deficient. Appellant was not denied effective assistance of counsel.[7]

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[7] Appellate defense counsel moved to hold the 3 February 1992 decision in abeyance and required discovery of information on appellant's mental condition pending receipt of that information. That motion was denied. *United States v. Loving,* ACMR 8901123 (A.C.M.R. 3 Feb. 1992) (order) (unpub). In denying that motion, this Court reviewed information concerning appellant's mental responsibility and determined that the issue was not raised on appeal. During oral argument appellate defense counsel informed this Court that he had obtained the requested information. Although not specifically asserted as an error before this Court, we have examined the information submitted with the supplemental assignment of error relating to appellant's mental condition. We have again concluded that the issue of appellant's mental responsibility has not been raised on appeal. *See United States v. Lilly,* 25 M.J. 403 (1988); *United States v. Triplett,* 21 U.S.C.M.A. 497, 45 C.M.R. 271 (1972).

IV.

Finally, appellant alleges that he was denied equal protection of the law. His argument is that the Navy and Marine Corps defense appellate agency has assigned appellate counsel in the grade of major in one death penalty case and lieutenant commander in another. One appellant also has civilian counsel retained at goverment expense.[8] He also alleges that in each case military counsel is completely free of all other assigned cases and represents a single client. He concludes that appellants who are sentenced to death and who are members of other branches of the service are much better represented than those in the Army. With no citation to authority, he concludes that "[t]his is a blatant violation of the due process and equal protection guarantees of the Constitution." We disagree.

An accused has no right to select military appellate defense counsel. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1202 discussion. An accused is entitled to be represented by appellate defense counsel when requested by the accused, when the United States is represented by counsel, or when the Judge Advocate General has sent the case to the Court of Military Appeals. UCMJ art. 70(c), 10 U.S.C. § 870(c). Under that statutory provision, counsel "must be a judge advocate who is a graduate of an accredited law school or is a member of a Federal court or highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State." UCMJ art. 27(b)(1), 10 U.S.C. § 827(b)(1). In the case before us, appellate defense counsel meets those qualifications.[9] So long as appellate defense counsel meets those legal qualifications, there is no right to counsel of particular rank or particular abilities. *Cf.* Dep't of Army, Pam. 27-173, Trial Procedure, para.

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[8] See discussion in part II of this opinion.

[9] Of course, counsel must be competent. See Part II of this opinion.



5-3 (20 April 1990); Manual for Courts-Martial, United States, 1984, Rules for Court-Martial 502(d)(1) Analysis, app. 21 at A21-25 (rule of eqivalency is not necessary where counsel are legally qualified). We recognize that the Equal Protection Clause of the fourteenth amendment applies to the armed forces through the Due Process Clause of the fifth amendment subject to certain exceptions necessitated by conditions of military service. *See Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). Congress has sanctioned distinctions between treatment of personnel in various services. *See United States v. Hoesing*, 5 M.J. 355 (C.M.A. 1978). Uniformity is not required among the services, and lack of uniformity is not necessarily a violation of equal protection. *Id.* Assignment of appellate defense counsel by each of the services falls within this category. We hold appellant was not denied equal protection of the law.

After careful review of appellant's assertions, to include the supplemental assignment of error, the Petition for Reconsideration is denied.

Judge HAESSIG and Judge ARKOW concur.

**APPENDIX E**

U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

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NMCM 87-3856

UNITED STATES

v.

RONNIE A. CURTIS, 511-74-5202, LANCE CORPORAL (E-3),
U.S. MARINE CORPS.

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Sentence Adjudged 6 Aug. 1987.
Decided 30 June 1989.

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Accused, a lance corporal in the United States Marine Corps, was convicted by general court-martial convened at Camp LeJeune, North Carolina, Sabastian Gaeta, Jr., J., of homocide and sentenced to death and he appealed. The United States Navy-Marine Corps Court of Military Review, Strickland, J., held that: (1) procedures of the Rules for Courts-Martial for imposition of death sentence were properly promulgated; (2) delegation of power to the President to promulgate the rule was not unconstitutional; (3) trial counsel presented racially neutral explanation for preemptory challenge directed to one member; (4) death penalty was appropriate; and (5) it is not a denial of the equal protection to provide death penalty for service members while not providing for civilians.

Affirmed.



BYRNE, C.J., filed an opinion concurring in part and dissenting in part.

ALBERTSON, J., filed an opinion concurring in part and dissenting in part.

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LCDR L. Saccoccio, JAGC, USN, Appellate Defense Counsel.

LT. Scott A. Hagen, JAGC, USNR, Appellate Government Counsel.

Capt. Thomas D. Miller, USMC, Appellate Government Counsel.

Before the Court En Banc.

STRICKLAND, Judge:

Appellant was tried at Camp Lejeune, North Carolina, by a general court-martial composed of officer and enlisted members. Contrary to his pleas, he was found guilty of two premeditated murders, larceny, burglary, unlawful entry, indecent assault and damage to Government property in violation of Articles 118, 121, 129, 130, 134 and 108, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 918, 921, 929, 930, 934, and 908, respectively. Additionally, in accordance with his plea, he was convicted of disobeying a general order in violation of Article 92, UCMJ, 10 U.S.C. § 892. On August 6, 1987, Lance Corporal Curtis was sentenced to death. The convening authority approved the sentence as adjudged.

We determined that this case presented issues of exceptional importance and, thus, pursuant to Rule 17, Courts of Military Review Rules of Practice and Proceduure, decided to hear this case *en banc*.

Appellant raises seven allegations of legal error on appeal. We have carefully considered each assignment of error in this capital case and will discuss each *seriatim*. Having reviewed the

record pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866, we conclude that the assignments of error have no merit and that no prejudicial error was committed which affects the findings or sentence.

## I.
## STATEMENT OF FACTS

Appellant, Lance Corporal Ronnie A. Curtis, reported to 3d Battalion, 2d Marines, 2d Marine Division, Camp Lejeune, North Carolina, in January 1985 and was assigned duties as a supply administrative clerk. His officer-in-charge was First Lieutenant James F. Lotz, the battalion supply officer. With the exception of an overseas deployment, Curtis and Lieutenant Lotz worked together in the same office for the next two years.

During this time period, Curtis visited Lieuteant Lotz's quarters aboard Camp Lejeune on several occasions; once for a supply section barbecue and on other occasions to pick up or deliver items related to supply work. As a result, Curtis learned the specific location of Lotz's quarters and, in addition, met Lieutenant Lotz's wife, Joan, who was a school teacher at the high school aboard the base.

Also during this time frame, Curtis, who is black, formed the perception that Lieutenant Lotz was racially prejudiced. This was apparently the result of certain nicknames used by Lotz such as "Bebop Curtis" and "Curtis Blow"; certain imitations of blacks done by Lotz; and, what Curtis perceived to be a different attitude toward and treatment of black Marines in the office. Curtis' perception of prejudice was flatly refuted by black friends and acquaintenances of Lotz, including a young black man who lived with the Lotzs and was treated like a son. Nevertheless, it was this perception which apparently led Curtis to the events of April 13 and 14, 1987.[1]

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[1] Whether this perception was the actual or only motive for these killings is subjected to question. For example, on the night of the murders, Curtis complained to his roommate that Lotz had recently forbidden office personnel from playing games on the office computers, a practice that had previously been tolerated. He expressed his displeasure over this and it may explain the fact that while Curtis was stealing the knife from the supply building he threw his office computer to the floor.



April 13, 1987, was a normal day in the supply section with Curtis going to work at 0730 hours as usual. Lieutenant Lotz was not in the office on this particular day, either in the morning or in the afternoon. Curtis got off work at 1630 hours and proceeded to his barracks room where he and his roomate listened to music for the next several hours. They then purchased a bottle of gin and continued to listen to music and drink mixed drinks for several more hours. During this time, Curtis consumed approximately one pint of gin.

According to Curtis' confessions and testimony, he then went for a walk and began thinking of the things that had been going on in the office and began thinking about Lieutenant Lotz picking on him. As he stood outside of the supply building where he worked, Curtis decided that he needed to kill his officer-in-charge.

Curtis determined he would use a knife to carry out his plan and he broke into the supply building, picked the lock on the security cage and stole a Marine Corps K-Bar knife (a large knife with a seven inch blade). Prior to leaving he damaged the office computer by throwing it on the floor. Next, he went back to his barracks room and obtained a pair of gloves so that he would not leave any fingerprints at the Lotz house. Curtis then stole a bicycle for transportation and, while riding the 1.5 miles to the Lotz home, devised a scheme that he knew would get him inside the house.

Curtis arrived at the Lotz home sometime after midnight. He carried the knife concealed in the waistband of his pants. He left the bicycle in the backyard and went to the front door and knocked.

Within minutes, Lieutenant Lotz appeared at the door. Curtis acted anxious and told Lotz that another Marine member of the supply section had been in an automobile accident and needed help. Lotz immediately asked Curtis inside and prepared to call the military police. As Lieutennant Lotz picked up the phone to assist one of his Marines whom he believed to be injured, Curtis withdrew the K-Bar from his waistband and stabbed the Lieutenant in the chest. Lieutenant Lotz tried to place a chair between himself and Curtis and called to his wife. Curtis then stabbed Lotz a second time in the back.

Within moments Joan Lotz emerged from the bedroom with a blanket wrapped around her. She first went to her dying husband and then confronted Curtis, kicking him in the shin with her bare foot and asking what they had ever done to him. Curtis then began to attack Mrs. Lotz. As she pleaded with him to stop, he stabbed her seven times in the head, neck and back. Then, as she lay on the floor dying, Curtis ripped and cut off her panties and fondled her vaginal area.

Curtis then searched the house to determine if any other persons were present with the intent that he would kill anyone he found. He rummaged through the house taking car keys and money for gas. He wiped clean the knife he had used in the killings and left the house, taking one of the Lotzs' cars. This car, however, had a standard transmission and Curtis had difficulty driving it so he returned to the crime scene. He thereupon reentered the Lotz home, found some additional money, checked both bodies and left a second time taking their other car.

He drove around aimlessly for some period of time and ultimately decided to leave town. As he was traveling down the highway, Curtis momentarily fell asleep at the wheel and ended up crashing in the ditch. The state police arrived and, in the course of the accident investigation, Curtis admitted killing the Lotzs. He subsequently made several other confessions to these crimes.



## II.
## MILITARY JUDGE'S INSTRUCTIONS

Appellant's first assignment of error is that the military judge improperly instructed the members as to the voting procedures they had to utilize to adjudge the death penalty. The military judge instructed the members that two votes were required in order to adjudge the death penalty. He instructed that, first, they must unanimously find at least one of the aggravating factors existed beyond a reasonable doubt and, second, they must unanimously find the death penalty to be the appropriate sentence. Appellant argues that, in addition, the members should have been instructed to vote and unanimously find that any extenuating or mitigating circumstances were substantially outweighed by any aggravating factors. This error is without merit because we find that the military judge properly instructed the members in accordance with the requirements of Rule for Courts-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), United States, 1984.[2]

This assigned error arises as a result of the wording in R.C.M. 1004(b)(4), MCM, 1984, which states:

> *Necessary findings:* Death may not be adjudged unless—
>
> (A) The members find that at least one of the aggravating factors under subsection (c) existed;
>
> (B) Notice of such factor was provided in accor-

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[2] The appellant does not challenge R.C.M. 1004, MCM, 1984, as a Constitutionally imperissible capital sentencing scheme. In our review of this case, we are satisfied that R.C.M. 1004, MCM, 1984, comports with the mandates of the Supreme Court that the members be required to make "an individualized determination on the basis of the character of the [accused] and the circumstances of the crime" and that the members "adequately differentiated this case in an objective, evenhanded, and substantively rational way" before imposing the death penalty. *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

dance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) *All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances* admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule. (Emphasis added.)

Appellant asserts that in order for "all members [to] concur" as required by subsection (C), there must first be a vote in which all members unanimously find that the extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances. At trial, this same argument was made and the military judge, in denying appellant's request for this additional vote, indicated that "he [was] obligated to follow the procedures as set forth by the President." The military judge's ruling that this additional vote was not required is supported by the plain language of R.C.M. 1004(b)(7):

*Voting.* In closed session, before voting on a sentence, the members shall vote by secret writen ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

The subsection requires that only two votes be taken by the members and not the three requested by appellant. The last sentence of this subsection clearly speaks of the aggravating factor determination vote being followed by the sentence determination vote with no discussion or provision for an intermediate vote.



The absence of a requirement for a vote as to the balancing test does not relieve the members of their obligation to perform this test. It merely does not require that they memorialize the specific result. Appellant argues that without such memorialization there is no way to determine if all the members concurred that any extenuating or mitigating circumstances were substantially outweighed by any aggravating factors. We do not agree.

R.C.M. 1004(b)(6) requires that the military judge instruct the members as to the "requirements and procedures" they must use to adjudge a death sentence, including instructions regarding the balancing test. We believe the military judge's instructions were in compliance with this provision. In his instructions, the military judge outlines a three-step procedure to be followed before a death sentence could be adjudged. These involved a determination of whether an aggravating factor existed, application of the balancing test and a consideration of whether death was appropriate. With respect to step two the judge instructed, in pertinent part:

. . . [y]ou may not adjudge a senence of death *unless* you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating factors as you have found existed in the first step of this procedure. (Emphasis added.)

The military judge thereafter instructed with respect to step three: "A sentence of death may be adjudged only upon the unanimous vote of all the members."

In following the judge's instructions (given orally, with written copies provided to the members), the members could only have voted for death after first finding that the extenuating or mitigating circumstances were substantially outweighed by any aggravating circumstances. Thus, it is implicit in the recorded, unanimous vote for the death penalty that each member properly applied the balancing test. No further memorialization is neces-

sary. Therefore, we hold that the military judge properly instructed the members as to the number of votes which are required by R.C.M. 1004, MCM, 1984.

Included in this assignment of error is the allegation that the military judge overemphasized the requirement that the members were required to unanimously concur in finding an aggravating factor, but underemphasized the requirement that the members could not adjudge a death sentence unless they all first concurred in the finding that any extenuating or mitigating circumstances were substantially outweighed by any aggravating circumstances. Appellant argues that because the military judge instructed on the first requirement seven different times but only mentioned the second requirement once, the members did not fully and fairly evaluate the evidence but instead adjudged the death penalty in a meaningless manner. We disagree.

Merely mentioning one requirement more than another during instructions does not alone constitute error. There must also be some indication that this resulted in the members improperly performing their duties. There is no such indication in this case. To the contrary, all indications are that the members properly deliberated according to the judge's instructions. Not only did the military judge in this case orally instruct the members, he also provided them written copies of the instructions. If the members had any questions or were confused as to the instructions given by the military judge they could have referred to their copies for clarification. Furthermore, if the members were still confused or did not understand the instructions even after referring to their copies, then they could have requested further clarification from the military judge in open court. However, because the members did not request further clarification in open court and because they could easily refer to their copies of the instructions, we are convinced that the members were neither misled nor misinformed as to their duties in adjudging an appropriate sentence. Accordingly, appellant was provided a fair and full



evaluation of all the evidence pursuant to R.C.M. 1004, MCM, 1984, which guaranteed meaningful deliberations by the members prior to the imposition of the death sentence.

## III.

## PRESIDENTIAL PROMULGATION OF R.C.M. 1004

The procedures followed in this capital case in ultimately adjudging the death penalty were those set forth in R.C.M. 1004, MCM, 1984. R.C.M. 1004 was promulgated by the President as a part of MCM, 1984 and became effective 1 August 1984.[3] Appellant contends that the sentencing procedures are invalid because the President exceeded the power delegated to him by Congress under Article 36, UCMJ, 10 U.S.C. § 836, in that the rule is substantive in nature and not procedural.

Judge Albertson, in her dissent, agrees with this proposition, but goes even further in finding fault with the death penalty provisions of MCM, 1984. It is her position that Article 118, UCMJ, has been invalidated as unconstitutional as a result of the United States Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Alternatively, she argues that the President impermissibly encroached on the legislative powers of Congress in promulgating R.C.M. 1004 or, if the delegation could be construed as permissible, Congress failed to provide sufficient specific guidelines to prevent the President from acting arbitrarily.

We disagree with these arguments and find that Article 118, UCMJ, has not been rendered unconstitutional and that the Presidential promulgation of R.C.M. 1004 was legally valid.

### A.

We turn first to an analysis of the post *Furman* status of Ar-

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[3] It was subsequently amended by Executive Order No. 012550 of 19 February 1986 (MCM 1984, change no. 2).

ticle 118, UCMJ. In *Furman* and its progeny, the Supreme Court struck down various state death penalty statutes as violating the Eighth Amendment because sentencing authorities were permitted to exercise uncontrolled discretion in determining whether to impose the death senence. As Judge Albertson points out, the dissenters in *Furman* speculated as to the effect the decision might have on other existing state and federal statutes, including the Uniform Code of Military Justice. This speculation, however, was simply dicta and in no way directly affected any other statute, including the capital sentencing provisions of Article 118, UCMJ. The decision that did affect these provision was handed down by the United States Court of Military Appeals in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). As a result, we must turn to *Matthews* to determine the status of Article 118, UCMJ.

In *Matthews*, the Court of Military Appeals held that the death sentencing procedures employed by courts-martial in capital cases were defective because of the failure to require the court members to make specific findings as to individualized aggravating circumstances which could be factually and legally reviewed on appeal. *Id.* at 380. This holding did not invalidate Article 118, UCMJ as being unconstitutional. Instead, it merely found that the *procedures* utilized in imposing the death sentence were constitutionally inadequate. The Court recognized Congress' intent that the death penalty be a sentencing option only for certain offenses, including premeditated murder, *id.* at 380, and the Court noted the effect their ruling would have:

> Our ruling in this case . . . creates a void which must be filled promptly in order to effectuate the congressional intent that court-martial members have the option of imposing a death sentence for certain crimes.

*Id.* at 381.

However, the Court further specifically recognized the continuing vitality of Article 118 by setting forth two alternative means to remedy the deficiencies of the sentencing procedure, neither of which required that Congress reaffirm its intent that the death penalty be authorized for premeditated murder. *Id.* at 380, 381. Congressional intent that the death penalty exist as a permissible sentence for premediated murder was in no way thwarted nor invalidated by *Matthews*. We find no holding of any court which has invalidated Article 118 as unconstitutional.



**B.**

The effect of *Matthews* was to prohibit the imposition of the death penalty until the procedural defect found by the Court was remedied. The Court noted that the action to remedy this defect could either be taken by Congress or the President. *Id.* at 380. Corrective action was taken by the President when R.C.M. 1004 was promulgated as a part of MCM 1984. The issue is whether this promulgation was legally valid.

Congress has delegated several of its powers with respect to the UCMJ to the President. Article 56, 10 U.S.C. § 856 delegates the power to set maximum punishments for certain courts-martial offenses and Article 36 delegates the power to prescribe rules. Article 36, UCMJ, provides, in pertinent part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall . . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

To determine whether the promulgation of R.C.M. 1004 properly falls within this provision we first look to the Court of Military Appeals discussion in *Matthews.* When indicating that corrective action could be taken by the President in his capacity as Commander-in-Chief under Article II, Section 2, of the Constitution, and pursuant to the power delegated to him by Congress, the Court stated:

> Pusuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. However, as contemplated by Article 56 of the Uniform Code, 10 U.S.C. § 856, the President prescribes maximum punishments for the various offenses. . . .
>
> The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases. . . .

*Id.* at 380, 381.

It is certainly clear from this language that the Court believed it was well within the President's power, as delegated to him by Congress, to promulgate these procedures.[4]

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[4] The Court of Militry Appeals belief that the President has the power to promulgate these procedures is also consistent with the Court's holding in *United States v. Flucas,* 49 C.M.R. 449 (C.M.A. 1975), where the Presidential promulgation of a Manual provision was found to be valid which added the element of knowledge in assault cases where this element was provided as an aggravating factor increasing the maximum permissible punishment.



The court's analysis that the sentencing defects were procedural in nature, and thus within the President's power to correct, is consistent with the Supreme Court's holding in *Dobbert v. Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). In *Dobbert,* the death penalty statute in effect at the time the defendant committed murder was struck down as violative of the holding in *Furman.* Prior to the defendant's trial, however, a new death statute was enacted. The question was whether the changes in the new statute were procedural in nature, thus allowing it to be retroactively applied against the defendant, or substantive, thereby prohibiting retroactive application based on the constitutional prohibition against *ex post facto* laws. *See* U.S. CONST. art I, § 10.

The original statute provided that a person convicted of a capital offense would be punished by death unless the jury recommended mercy. The revised statute established, *inter alia,* a bifurcated sentencing proceeding, a specific enumeration of aggravating circumstances, an opportunity to present relevant evidence of mitigating and aggravating circumstances, a test to balance mitigating circumstances against aggravating circumstances and procedures to review any death sentence imposed. In concluding that these changes were procedural and that there was no *ex ost facto* violation, the Court stated:

> . . . [t]he change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.

*Dobbert,* 432 U.S. at 293, 294, 97 S.Ct. at 2298, 53 L.Ed.2d at 356.

The Court further supported the conclusion that the change was procedural by quoting from *Hopt v. Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), as follows:

> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.

*Dobbert*, 432 U.S. at 294, 97 S.Ct. at 2298, 2299, 53 L.Ed.2d at 357.

R.C.M. 1004 established capital sentencing provisions which are similar to the statutory changes in *Dobbert*. R.C.M. 1004 sets forth aggravating factors, one or more of which must be found before death may be considered; provides a notice requirement concerning these factors; provides broad latitude to present evidence in extenuation and mitigation; establishes voting procedures; and provides for necessary findings, including a balancing test, as a prerequisite to adjudging a death sentence. As in *Dobbert*, R.C.M. 1004 simply altered the methods employed in determining whether the death penalty was to be imposed. Thus, we reach the same conclusion as the Court in *Dobbert* as to the nature of these provisions. We find that the changes in the capital sentencing scheme brought about by the provisions of R.C.M. 1004 are clearly procedural.

C.

The next question is whether such as promulgation is contrary to the intent of Congress. We analyze this from two perspectives. First, Article 36(b) requires that the President report to Congress when rules and regulations are made. In accordance with this provision, copies of the Executive Orders promulgating R.C.M. 1004 as a part of MCM, 1984, and the subsequent modification to R.C.M. 1004 were transmitted to Congress. 130 Cong.Rec. H-7611 (daily ed. July 23, 1984) (EC-3679); *id.* S-9217 (daily ed. July 25, 1984) (EC-3579); and 132 Cong.Rec. H-1022 (daily ed. March 11, 1986) (EC-2959); *id.* S-2355 (daily



ed. March 10, 1986) (EC-2667). Thereafter, no Congressional objection to R.C.M. 1004 was voiced and consequently, tacit approval of these procedures can be inferred. Second, and more important, is the Congressional intent reflected in the passage of Public Law 99-145, Title V, § 534(a), Nov. 8, 1985, 99 Stat. 634, which amended the Uniform Code of Military Justice by establishing espionage as a capital offense under Article 106a, UCMJ, 10 U.S.C. § 906a. This article creates certain aggravating factors which the members must unanimously find beyond a reasonable doubt in order to adjudge a sentence of death. In addition, it provides specific recognition of the President's power to delineate aggravating factors for a capital offense, as follows:

> (4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).

Article 106a(c)(4), UCMJ, 10 U.S.C. § 906a.

Furthermore, in considering the legislative intent associated with this act we note the following:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provisions of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles.

Department of Defense Authorization Act of 1986, Pub.L. No. 99-145, 1985 U.S.Code Cong. & Admin.News pp. 472, 579.

This legislative intent evidences a clear ratification of the Presidential action in promulgating R.C.M. 1004. This, com-

bined with the statutory provision allowing the President to establish aggravating factors and the tacit approval of R.C.M. 1004, convinces us that Congress does not believe that the President has encroached on its legislative prerogative in this matter.

**D.**

The only remaining question is whether, in spite of the beliefs of the Court of Military Appeals, the President, and Congress, promulgation of this rule is nevertheless constitutionally flawed because the Congressional delegation of power to the President under Article 36, UCMJ, is violative of the principle of separation of powers.[5] The Supreme Court has long recognized that Congress generally cannot delegate its legislative powers to another branch of Government. *Field v. Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294, 310 (1892). Nevertheless, they have recognized that this prohibition does not prevent Congress from acquiring the assistance of other branches. *J.W. Hampton, Jr. & Company v. United States*, 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed. 624, 629 (1928). In *Hampton*, the Court indicated:

> In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination. . . . Congress has found it . . . necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion . . . to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.

[5] U.S. CONST. art. I, § 1 provides that legislative powers shall be vested in the Congress of the United States.



*Id.* (Citations omitted).

As a result, many Congressional delegations of power have been upheld. *See, e.g., Mistretta v. United States*, __ U.S. __, 109 S.Ct 647, 102 L.Ed.2d 714 (1989) (upholding delegation to the United States Sentencing Commission of the power to promulgate binding sentencing guidelines for federal offenses); *Lichter v. United States*, 334 U.S. 742, 785-78, 68 S.Ct. 1294, 1316-1317, 92 L.Ed. 1694, 1725-1726 (1948) (upholding delegation to Secretary of War and other administrative officials of the authority to determine excessive profits); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600, 64 S.Ct. 281, 287, 88 L.Ed. 333, 344 (1944) (upholding delegation of authority to Federal Power Commission to determine just and reasonable rates).

The Supreme Court has upheld Congressional delegation of authority where it "is sufficiently specific and detailed to meet constitutional requirements", *Mistretta*, __ U.S. at __, 109 S.Ct. at 655, and where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103, 116 (1946). In her dissent, Judge Albertson argues that Article 36, UCMJ, fails to meet these requirements, particularly as to establishing specific standards to prevent the President from acting arbitrarily. We do not agree.

Article 36, UCMJ, delineates the general policy to prescribe pretrial, trial, and post-trial procedures for cases tried by courts-martial. It states that the authority is delegated to the President, and, most importantly, it *does* establish specific boundaries to limit the President's action under this provision. The President, in prescribing these procedures, is bound to apply the principles of law recognized in criminal trials in the United States district courts. Consequently, he does not have unfettered discretion to do as he pleases. Rather, he may not act arbitrarily and he must follow the law. He is subject to an additional check in that he

must report all rules and regulations made under this article to the Congress.

The President's action in promulgating R.C.M. 1004 falls squarely within the specific and detailed boundaries of his authority. R.C.M. 1004 complies not only with the legal principles of the United States district courts, but also with those of the United States Supreme Court. *See Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). We find no defect, constitutional or otherwise, in the promulgation of this rule.

## IV

### Equal Protection

Appellant alleges that he has been denied his right to the equal protection of the law and to be free from cruel and unusual punishment because as a member of the armed forces he has been sentenced to death when this punishment is not available for murder tried in federal civilian courts. The appellant's assertion that his rights under the Fifth and Eighth Amendments have been violated by Congress' decision to make the death penalty available for violations of Article 118, UCMJ, and the President's promulgation of the procedures in R.C.M. 1004, MCM, 1984, for the imposition of the death penalty, is without merit.[6]

[6] The Eighth Amendment is violated when the death penalty is carried out in barbaric or inhumane method or if it is excessive in relation to the crime committed. *See Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); *Gray v. Lucas,* 677 F.2d 1086 (5th Cir.1982). Since the appellant has not factually developed the method in which naval personnel are to be executed and since the question of whether the death penalty is proportionate to appellant's crime is fully discussed in section VIII, we will analyze this allegation of error pursuant to the due process clause of the Fifth Amendment.



The Court of Military Appeals has held that not every distinction or varied treatment of military personnel made by the Government violates equal protection guarantees of the Constitution. *United States v. Means,* 10 M.J. 162, 165 (C.M.A. 1981). It is only when the distinction or treatment becomes unjustifiable discrimination that a service member's due process rights to the equal protection of the laws are implicated. *United States v. Rodriguez-Amy,* 19 M.J. 177, 178 (C.M.A.1958); *United States v. Larner,* 1 M.J. 371, 375 (C.M.A.1976). In order to determine when a distinction or treatment is justifiable it is necessary to first examine whether the Government has utilized constitutionally suspect classifications such as race, religion, or national origin, or whether the Government is encroaching on fundamental constitutional rights. If neither suspect classifications nor fundamental constitutional rights are involved, then the Govenment's varied treatment of service members need only have a reasonable or rational basis. *Means,* 10 M.J. at 165.

Appellant has alleged that his fundamental right to life is encroached by the Government's decision to make the death penalty a permissible sentence for service members and, therefore, a higher standard of scrutiny should be utilized than the rational basis test for determining whether he has been denied equal protection of the law. This particular issue is of first impression in military law and we will look to federal case law for precedent. The Fifth Circuit Court of Appeals has twice examined this exact issue. In *Gray v. Lucas,* 677 F.2d 1086 (5th Cir.1982), *cert. denied,* 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983) the Court held that the presence of a death penalty in a criminal statute does not encroach on a fundamental right so as to trigger a heightened level of scrutiny. The Fifth Circuit based its decision on the Supreme Court's reasoning in *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In *Gregg,* the Supreme Court reasoned that because of the complex issues involved in determining the moral values of so-

ciety and the social utility of the death penalty, it is particularly within the province of the legislature to establish the degree of punishment for certain classes of crimes. Therefore, the Court reasoned that the decision to authorize the death penalty for certain classes of crimes should not be upset by the courts unless it is "clearly wrong." *See Gregg*, 428 U.S. at 186-188, 96 S.Ct. at 2931, 49 L.Ed.2d at 882. Accordingly, it was held in *Gray v. Lucas* that equal protection challenges to a death penalty scheme should be analyzed under a rational basis test, and not the heightened level of scrutiny which appellant urges. This holding was later reaffirmed in *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir.1987), *cert. denied*, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987).

The legal reasoning in *Gray v. Lucas* and *Williams v. Lynaugh* is sound and we will, therefore, analyze appellant's equal protection challenge to R.C.M. 1004, MCM, 1984, according to the rational or reasonable basis test. *But cf. Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (the punishment of sterilization was held to encroach upon the fundamental right of procreation).

Congress had a rational basis for deciding to authorize the death penalty for a violation of Article 118 and to delegate to the President the task of promulgating the procedures to impose this punishment on service members. Service members, because of their mission to wage war, may need the more stringent deterrent of capital punishment to ensure discipline. It is the necessity to secure from service members "prompt obedience to lawful orders and the maintenance of the orderliness and self-discipline necessary to the effective operation and control of an armed force in combat" that precipitated the establishment of the UCMJ as a disciplinary system. *United States v. Van Steenwyk*, 21 M.J. 795, 801 (NMCMR 1985). It is because "the military is by necessity, a specialized society separate from civilian society" that civilian definitions of "criminal law" cannot be applied to establish



the parameters necessary to maintain military discipline. *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439, 450 (1974). Therefore, it is reasonable for Congress to ensure military discipline by providing a heightened punishment for a breach of military criminal law than would be authorized for similar breaches of federal civilian criminal law.

It is also reasonable for Congress to address the potential fears that the civilian community may have towards maintaining a professional and permanent fighting force by authorizing death for certain heinous crimes, such as murder. Clearly, a rational basis exists for the federal Government to distinguish civilians convicted of murder from federally trained and government spionsored military members convicted of murder and to legislate a different form of punishment for these two classes of criminals. Thus, we find the appellant's equal protection challenge to the punishment of death for a violation of Article 118 and to the procedures as set forth in R.C.M. 1004 to be without merit.

## V

### Challenge For Cause

After lengthy *voir dire*, one of the prospective members, Captain Emerson, was challenged for cause by the Govenment. The Government based its challenge on the case of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), arguing that because of his religious up-bringing and beliefs, Captain Emerson could never, under any circumstance, vote to impose the death penalty. The military judge granted the Government's challenge for cause, stating:

> I believe that he would not have any difficulty in voting for a finding of guilty which would automatically result in a penalty of death. But in this case I think it it clear to the military judge that he does have an inelastic attitude as described for—to voting in *U.S. v. Rojas*, [15 M.J. 902 (NMMR 1983)] and although he used

> the words that he would consider, I don't think that that consideration would be a meaningful one anyway, and that, notwithstanding his sincerity, he would be compelled to vote for the alternate punishment.

Appellant asserts that the military judge erred in granting this challenge for cause. He contends that the military judge's reliance on *Witherspoon* and *United States v. Rojas*, 15 M.J. 902 (NMCMR 1983), was misplaced and that a new standard exists which would not have excluded Captain Emerson. Appellant is correct to the extent that the standard applicable to this challenge is the one set forth in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). However, we find that the military judge considered *Adams* in making his ruling and that Captain Emerson's views concerning capital punishment permitted his challenge under this standard. Thus, appellant's contention is without merit.

In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court reaffirmed that *Adams v. Texas* established the proper standard for determining when prospective jurors may be excluded for cause because of their views on capital punishment.[7] *Adams* permits a juror to be challenged for cause when his views about capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Wainwright*, 469 U.S. at 423, 105 S.Ct. at 851, 83 L.Ed.2d at 851. This standard abolishes the *Witherspoon* reference to "automatically" voting against the death penalty, thereby dispensing with the requirement that a juror could only be excluded if he would never vote for death. In addition, it eliminates the ex-

[7] In reaffirming this standard, the Court noted that the genesis for excusing jurors in capital cases was to prevent the state's legitimate interest in administering constitutional capital sentencing schemes from being frustrated. *Wainwright*, 469 U.S. at 423, 105 S.Ct. at 851, 83 L.Ed.2d at 851.



tremely high burden of proving that a juror's bias is "unambiguous" or "unmistakably clear". *Id.* 469 U.S. at 423, 424, 105 S.Ct. at 851, 852, 83 L.Ed.2d at 851, 852.

In applying this standard in *Wainwright*, the Supreme Court upheld the trial judge's excusal for cause of a juror who stated that her beliefs concerning the death penalty would interfere with her sitting as a juror. In so finding, the court gave great deference to the trial judge's findings as long as the findings were fairly supported by the record regardless of whether a reviewing court might disagree with these findings. The Court noted:

> . . . determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 434, 105 S.Ct. at 857, 83 L.Ed.2d at 858, citing *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

The Supreme Court similarly applied the *Adams* standard in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and upheld the removal of eight jurors for cause prior to the guilt phase of a bifurcated trial. In that case, the trial

judge removed for cause eight of the jurors who stated that they could not under any circumstance vote for the imposition of the death penalty.

In this case, Captain Emerson was thoroughly questioned by both counsel and the military judge. He indicated that he had definite reservations concerning the death penalty. These reservations were founded on his religious teachings and belief that only God could take a life. Captain Emerson appeared to be quite ambivalent during the initial portion of the *voir dire* as to how his beliefs might affect his ability to sit as a member and adjudge a sentence.[8] Subsequently, however, his feelings became much more focused, particularly after he realized that he had another option available during sentencing other than death:

> DC: Well, I'm a little confused because it seems to me that you're saying two things at the same time. Are you saying that it's your religious belief that it's an extremely difficult thing to do, to vote for a death penalty?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> DC: And at the same time you're saying that, yes, because of my obligation as a military officer, I could consider it and I could do it?
>
> MEM(CAPT EMERSON): I could consider it, but once again I stated that if there is another option that I would probably sway towards the other option.

R. 167, 168.

[8] It is clear from the record that Captain Emerson's religious beliefs would not have interfered with his ability to determine guilt or innocence during the findings phase of the trial.



> TC: So you, under no circumstances, because of your religious beliefs could vote for a penalty of death regardless of the facts and circumstances of the case?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: You could consider it, but you could not vote for it?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: Because of your religious beliefs?
>
> MEM(CPT EMERSON): Yes, sir.
>
> TC: And that's the truth from the bottom of your heart, is it not?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: Captain Emerson?
>
> MEM(CAPT EMERSON): When he asked me do I consider it, I said "I'd consider it." But once again, I will always go with the other option.

R. 169.

> MJ: Now, considering the prefatory remarks of Major Boyett, we got to the point in which you were called upon to cast your vote either for the death penalty or for the other alternative punishment. Do I correctly understand that you would in all events cast your vote for the alternative punishment?
>
> MEM(CAPT EMERSON): Yes, sir.

R. 173.

The foregoing testimony clearly illustrates that Captain Emerson's beliefs would affect his ability to adjudicate a sentence in that he would always choose an alternative other than death even though he would "consider" death. We agree with the military judge that this "consideration" would not be a meaningful one.

We must now examine Captain Emerson's responses in light of the *Adams* test to determine whether his exclusion for cause was proper. We initially note that, contrary to appellant's assertion, the military judge did not rely solely on *Witherspoon* and *Rojas* in ruling on this challenge. In fact, following a recess toward the end of *voir dire*, he compared Captain Emerson's responses specifically with the *Adams* and *Lockhart* cases.

We give deference to the military judge's determination of Captain Emerson's views based on his personal observation of Captain Emerson and conclude that it is fairly supported by the record. We find that if Captain Emerson had been allowed to serve as a member in this case he would have effectively frustrated the Government's legitimate interest in administering its constitutionally valid death penalty scheme by always voting for an option other than death regardless of the circumstances. We find that Captain Emerson's views would have prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath. The excusal of Captain Emerson for cause was proper.

## VI

### Denial of Right to a Panel of Fair and Impartial Members

Appellant made a motion for appropriate relief at trial asserting that his Sixth Amendment right to an impartial jury had been violated in that the members selected by the convening authority did not represent a cross section of the community. This same issue is raised on appeal and, in addition, appellant contends that even if the Sixth Amendment is inapplicable to courts-martial, he nevertheless was denied his due process right to be tried by members with fair and open minds whose impartiality could not be reasonably questioned. We find no merit to either contention.



In support of his motion, appellant called a clinical psychologist to testify. The witness was qualified as an expert in behavioral psychology. As to foundational matters, the psychologist testified that he was aware of the fact that appellant was alleged to have murdered a Marine officer and his wife, that he had reviewed the convening orders and modifications, and was aware of the composition of the prospective membership of the court. The psychologist testified that he was concerned that the officer members would not be totally impartial and objective because of their higher likelihood of identifying with the victim, who was also an officer. He proposed that the situation could be remedied by selecting the prospective members at random. No inquiry was made of the psychologist as to the ability of an officer chosen at random to be impartial and objective. Subsequently, the members were extensively questioned in *voir dire* and, as appellate defense counsel concedes in his brief, the officer members who ultimately decided the case gave no specific responses during *voir dire* which indicated any inability to be impartial. It is also significant to note that the assistant defense counsel acknowledged to the military judge that there was no indication that the convening authority had failed to comply with Article 25, UCMJ, 10 U.S.C. § 825.[9]

Congress has specifically prescribed in Article 25, UCMJ, the qualifications for service as a member of a courts-martial. It provides in pertinent part:

> [T]he convening authority shall detail as members thereof such members as, in his opinion, are best qualified for the duty by reason of age, education, training,

[9] This is uncontested on appeal.

experience, length of service, and judicial temperament.

The Court of Military Appeals has noted on several occasions that the Sixth Amendment right to a jury composed of a representative cross section of the population does not apply to courts-martial and, in fact, Article 25 contemplates otherwise. *See United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A.1988); *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986).

We consider unpersuasive the appellant's argument that the testimony of his expert, standing alone, was sufficient to dismiss the members.

The record contains nothing at all to support appellant's conclusion. The expert testified in advance of *voir dire* and expressed a "concern" that the officer members might identify with the victim and therefore be partial. This "concern" was wholly unsubstantiated by specific responses of prospective officer members during *voir dire*. While the expert had testified in numerous trials, he admitted that this was the first time he had expressed an opinion on this particular issue. Finally, his remedy to resolve the situation—to randomly select members from the command—leaves open the distinct possibility that the officers chosen in this manner might have the same inclination to identify with the victim. His remedy in no way seeks to exclude officers entirely from the panel[10] which would logically resolve his concern, but merely offers an alternative method for selecting prospective members than is set forth in Article 25. The proposed remedy is inconsistent with the psychologist's own opinion and detracts from its validity. We find nothing to support the allegation that

[10] While an accused is not entitled to a panel composed of entirely enlisted personnel, Article 25 does not preclude such a result. It merely requires that *at least* one-third of the members be enlisted when the accused has made a request for enlisted members.



the officer members might not be impartial. To the contrary, the record is replete with assurances by the members that they would follow the law and give appellant a fair trial. The military judge correctly denied this motion for appropriate relief.

## VII

### Peremptory Challenge

At the conclusion of *voir dire*, Government counsel peremptorily challenged Staff Sergeant Edwards, a black, who is of the same racial group as appellant. Defense counsel objected on the basis that the peremptory challenge was used in a discriminatory manner, but the objection was ultimately overruled by the military judge. Appellant contends that the military judge erred in this ruling, thereby denying his right to equal protection of the law.

The Supreme Court has held that a defendant has the right to be tried by a jury from which no "cognizable racial group has been excluded" and, thus, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79 at 89, 106 S.Ct. 1712 at 1719, 90 L.Ed.2d 69 at 83 (1986). This right to equal protection is part of due process under the Fifth Amendment and applies to trials by Courts-Martial. *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988). *See also United States v. Shelby*, 26 M.J. 921 (NMCMR 1988).

*Batson* provides that once the defendant makes a prima facie showing of purposeful discrimination in the Government's use of the peremptory challenge, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. A prima facie case is established when the defendant shows that he is a member of a cognizable racial group; that the pros-

ecutor exercised peremptory challenges to remove members of defendant's racial group; and, that these facts and any other relevant circumstances raise an inference that the use of these challenges was to purposely exclude jurors because of race. This inference is based on the totality of the circumstances and such things as a "pattern" of strikes of members of a racial group or the prosecutor's questions and statements during *voir dire*, may be considered. *Batson*, 476 U.S. at 96, 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88.

It is insufficient to rebut the prima facie case by a mere assertion of the prosecutor that he was properly performing his duties and had no discriminatory motive for his challenge. It is not, however, necessary for the neutral explanation to rise to the level that would justify a challenge for cause. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1722, 1723, 90 L.Ed.2d at 88. In *Batson*, the case was remanded because the prosecutor used his peremptory challenges to remove all four black persons on the venire which resulted in the defendant, also black, being tried by an all white jury.

In *Santiago-Davila*, the accused was of Hispanic descent and the court members selected by the convening authority consisted of ten officer and enlisted members, two of whom had Hispanic surnames. Following *voir dire*, the Government peremptorily challenged one of the Hispanics and the military judge allowed the challenge to stand in spite of an objection by defense counsel. The military judge offered trial counsel an opportunity to state a reason for the challenge but trial counsel declined to do so and the military judge did not require that a reason be given. In remanding *Santiago-Davila*, the Court of Military Appeals found that a prima facie case of purposeful discrimination had been established which required that a neutral explanation be given. The Court was not persuaded by the fact that one Hispanic remained on the panel, and it was of particular importance that they found an absence of anything in the *voir dire* or anywhere else in the record to clearly indicate anything other than race as a motive for the challenge. *Santiago-Davila*, 26 M.J. at 391.



Turning to the case *sub judice*, the court selected by the convening authority consisted of nine officers and six enlisted members. Of these, six were black. One black officer was successfully challenged for cause by the defense because he knew Lieutenant Lotz and was Lotz's superior in the chain of command. Another black officer, Captain Emerson, was also challenged for cause by the Government for the reason discussed in a prior assignment of error. The Government further successfully challenged for cause a white officer without objection and the defense similarly challenged for cause two more white officers. Thus, at the time the Government exercised its peremptory challenge against Staff Sergeant Edwards, the panel consisted of four officers and six enlisted persons, four of whom were black. The final racial composition of the court was six whites and three blacks (one officer and two enlisted).

During *voir dire*, trial counsel initially experienced some difficulty in ascertaining that Staff Sergeant Edwards understood the concept of the government's burden to establish guilt beyond a reasonable doubt and required assistance by the military judge in defining terms. Thereafter, the *voir dire* appeared to proceed smoothly without revealing anything of particular significance until the following relevant exchange occurred:

> TC: I'll just ask one general question, Staff Sergeant. How do you feel about, again, being—sitting here as a member in this case? Your own words.
>
> MEM(SSGT EDWARDS): I feel, sir, basically that it would be to me a learning experience. And coming in with an open mind, being able to give everything, weighing out everything, and listening to all the facts before I finally say whether a person is innocent or

guilty, it would be a good experience for me and something that I would like to go through, sir.

TC: You'd also agree that not—it's not only would be a learning experience, it would be a very, very serious responsibility?

MEM(SSGT EDWARDS): Yes, sir.

TC: Possibly one of the more serious responsibilities in your whole life?

MEM(SSGT EDWARDS): Yes, sir.

This concluded the *voir dire* of Staff Sergeant Edwards and he was subsequently peremptorily challenged by the Government. Defense counsel made a timely objection and requested that the government state the reason for the challenge. At the time, because *Santiago-Davila* had not yet been decided, the military judge and counsel recessed and considered the ruling in *Batson*. Thereafter, the military judge and trial counsel believed it would be best for trial counsel to state the reason for his challenge. There was no discussion or finding as to whether a prima facie case of purposeful discrimination had been established. The defense counsel expressed his concern as follows:

DC: Now, it strikes the defense that the government has known for some three and a half months that this case involved a defense theory which potentially would involve racial prejudice. As I remember the answers of Staff Sergeant Edwards, he met all legal criteria to be a member. No one had any objection to him for cause or anything like that. And it strikes the defense as rather strange at this particular point in time that the government is using its one peremptory challenge to take a black man off this jury. Of course, there's nothing that I can point to which proves that it's racially motivated in any particular form, fashion, or manner because I can't look in the minds of the prosecution. But it essentially gives a bad flavor to the whole thing and it's the position of the defense that we should not only be worried about actual fact, but impression and how it looks as well because the court is, after all, essentially, an instrument which is supposed to arrive at fairness.



The military judge discussed the challenges of the other blacks from the panel.

MJ: Well, of course, there were—I think at least two black members that were excused by challenges for cause, but neither one of those had any racial foundation; is that correct?

DC: Yes, sir.

After further discussion concerning specific rationale for these challenges, trial counsel stated his reason for challenging Staff Sergeant Edwards.

TC: My articulation, sir, is, first of all, in my opinion Staff Sergeant Edwards' responses to the voir dire, while satisfactory, didn't indicate to me to be the kind of member that the government would want on this case and one thing particularly that he said, if I remember correctly, he said that he would consider this as a learning experience which, in the Government's opinion, that was not the—while not challengeable for cause, that is why the government chose to exercise its peremptory challenge on him.

Appellant contends that this is not the neutral basis for challenge required by *Batson*. The Government asserts that trial

counsel's explanation indicated that the purpose for the challenge was race-neutral assuming *arguendo* that a prima facie case of discrimination had been shown.

In deciding this issue we will initially analyze whether there was a prima facie showing of purposeful discrimination in connection with the peremptory challenge of Staff Sergeant Edwards. First, appellant is a member of a cognizable racial group and, second, the Government's peremptory challenge sought to remove a member of that group. The only remaining question is whether the totality of the circumstances raise an inference that the challenge was used to exclude this member solely because of race.

Examining the pattern of challenges exercised by trial counsel, we note that challenges for cause were exercised against one white and one black officer. The black officer was challenged because of his beliefs regarding capital punishment. In fact, defense counsel agreed with the military judge that this challenge had no racial foundation. Appellate defense counsel further concedes that he can point to nothing which proves the challenge was racially motivated. Our review of the record likewise reveals nothing said by trial counsel during *voir dire* that would infer the challenge was racially motivated. Our determination of this question is hampered by the fact that the military judge made no findings with respect to this prima facie showing either because he simply neglected this step in applying the *Batson* principles or because he believed there was an automatic inference of purposeful exclusion merely because of the defense theory involving racial prejudice or for some other reason. Without speculating further, we will exercise caution and follow the Court of Military Appeals in their belief that the trial judge is able to decide if all of the circumstances surrounding the challenge create a prima facie case. *Santiago-Davila,* 26 M.J. at 392.

Finally, we must analyze whether trial counsel's explanation was neutral. Trial counsel stated that Staff Sergeant Edwards



was not the kind of member the Government wanted on the case because he stated he would use it as a learning experience.[11] In response to this explanation the military judge indicated that this was the only thing he had written down with respect to Staff Sergeant Edward. He noted that it was probably an unfortunate choice of words but it nevertheless caught his attention. The military judge, in denying the defense's objection and thus sustaining the peremptory challenge, found that, while he might not agree with the Government's stated reason, it was understandable and had sufficient foundation to satisfy *Batson.* We agree with the militlary judge.

Trial counsel's questioning during the entire *voir dire* reflected the fact that he wanted the court to consist of members who were aware of the serious responsibility of deciding a capital case and who were capable of carrying out that responsibility. We believe that trial counsel sensed something less than these qualities in Staff Sergeant Edwards and felt that a case with the serious consequences of this one should not be used an a "learning experience". We find this explanation to be totally devoid of any racial motivation and to be completely neutral.

## VIII

### Appropriateness of the Sentence to Death

Finally, we consider the appropriateness of appellant's sentence to death. Appellant contends that he should not be put to death because his murder of the Lotzs was simply a reaction to the way he had been treated by Lieutenant Lotz. He also con-

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[11] There may have been other factors of concern to trial counsel such as the difficulty he encountered in explaining to Staff Sergeant Edwards the concept of the Government's burden to prove guilt beyond a reasonable doubt. We will not speculate, however, as to what "other" factors may have influenced trial counsel to exercise this challenge and we have confined our analysis solely to the reason stated in the record.

tends that no proper penal interest would be served by such a sentence. He argues that these factors militate against imposition of the death penalty in this case. Chief Judge Byrne in his dissent, cites the "racial stereotyping of appellant by Lieutenant Lotz",[12] as well as the lack of recent precedent for executions in the Naval Service, as reasons for opposing the death penalty in this case. We do not agree with this reasoning.

We begin our analysis of this issue by carefully considering Lieutenant Lotz's relationship with his subordinates and the atmosphere that existed in the supply office. Lieutenant Lotz referred to his subordinates by nicknames, either nicknames he coined himself or those invented by others. A Marine of Peruvian descent was called "a fuzzy headed foreigner'; others had names such an "tomahawk", "red', and "Jonesy". Lotz's use of nicknames was not confined to persons in his office and he called a black Marine officer friend, "Action Jackson". Several nicknames were used with respect to appellant— "Bebop Curtis" and "Curtis Blow" (apparently in reference to a black "rap" singer). In addition to the use of nicknames, Lotz allowed music to be played in the work spaces, and this was often "rap" music. While listening to this music, Lotz, on occasion, imitated what he thought were black mannerisms. The atmosphere was described by some as joking and casual.

Following a supply inspection, Litz as criticized by the inspector for calling his subordinates nicknames and was told that this practice was unprofessional. Thereafter, Lotz called the office personnel together and inquired as to whether the use of nicknames was offensive to anyone. No one persent, including

[12] In support of this reason, Chief Judge Byrne states that racial prejudice in sentencing was an underlying rationale for striking down the death penalty in *Furman*. Such rationale is inapposite to this case since in *Furman* the racial prejudice under consideration was that of the jury against the defendant rather than any prejudice by the victim against the accused as alleged in this case.



Curtis, voiced an objection to this practice and the use of nicknames continued.

Appellant testified that he was nevertheless bothered by these nicknames and by Lotz snapping his fingers at him, calling his mother by her first name and criticizing him for a bad attitude. Appellant acknowledged on cross-examination that his proficiency and conduct marks had improved under Lotz and that Lotz was training him for a job of increased responsibility within the office. Co-workers characterized the occasional criticism of Curtis as justified because Curtis was a slow worker and was sometimes lazy. Appellant asserts that Lotz's actions, as a whole, were offensive to him and that he perceived Lotz to be racially prejudiced.[13]

It is apparent that Lieutenant Lotz was insensitive to the feelings of minorities and to the potential effect of his conduct in this regard. Additionally, it is apparent that Lieutenant Lotz made the mistake which some junior, relatively inexperienced officers make of creating an overly familiar, informal atmosphere with his subordinates in an attempt to be accepted. This is not a proper

[13] We are unable to determine whether or not Lieutenant Lotz was, in fact, racially prejudiced. We note, however, that substantial evidence was admitted that Lotz was neither racially prejudiced nor acted in a discriminatory manner. For example, two black sergeants and a black staff sergeant who worked in the supply office testified that they did not believe that Lotz was racially prejudiced. They did not perceive "racial tension" in the office nor did they believe that the use of nicknames and imitations by Lotz were done in a racially derogatory fashion. The Company First Sergeant, also a black Marine, testified that during his twenty-five years of active duty he had seen racial prejudice; however, after knowing Lieutenant Lotz for two years, it was his opinion that Lotz was not prejudiced against black Marines. First Lieutenant Jackson, a black officer, knew Lotz well for almost eight months and testified that there was no question in his mind that Lotz was not prejudiced. Finally, a young black civilian testified that he lived with Lieutenant and Mrs. Lotz for about three months while he assisted Mrs. Lotz in coaching a basketball team at the school where she taught. He was treated as a member of the family in almost a "parental relationship".

or professional relationship between officers and enlisted personnel. The question, however, is whether Curtis should now be exempt from the death penalty beecause of the flawed leadership style of Lieutenant Lotz?

This question can be phrased in another manner: whether one who is dissatisfied with what he perceives to be the improper actions of his superior should escape the most severe punishment for murdering that superior? We believe tht it is contrary to the interests of society to mandate a lesser punishment for such a crime and still expect that such crimes will be deterred in the future. This is particularly true in a military environment where the very cornerstone of our system of discipline is the superior-subordinate relationship. To allow, or even suggest, that one should be less severely punished because of a "perception of maltreatment" by a superior would tear at the very fiber of our military system of discipline. We reject the notion that the death penalty is inappropriate under the circumstances of this case based on Curtis' perception of his relationship with Lieutenant Lotz.

Even if we were to believe that appellant's perception of mistreatment by Lotz somehow militated against the death penalty for killing Lieutenant Lotz, it is inexplicable why this in any way lessens his culpability for the brutal slaying of Mrs. Lotz. Curtis savagely stabbed Joan Lotz seven times as she begged for him to stop and then indecently assaulted her as she lay dying. Curtis admitted that Joan Lotz never did anything to hurt him.

We next address the argument that the death sentence is inappropriate simply because it has not been imposed in the Naval Service in recent history. This fact alone is not dispositive of the issue. As previously discussed in Section III, Congressional intent that death be a sentencing option for premeditated murder remains viable today. In addition, while no death sentences have been carried out in the recent past, the military community has recently expressed its intent that death is the appropriate sentence for premeditated murder under certain circumstances by



adjudging death at the courts-martial level. *See United States v. Turner,* No. 85-4044 (NMCMR 8 August 1986), *rev'd,* 25 M.J. 324 (C.M.A.1987), *aff'd,* No. 85-4044R (NMCMR 31 October 1988) (convening authority commuted death sentence to life imprisonment); *United States v. Rojas,* 15 M.J. 902 (NMCMR 1983) *rev'd in part,* 17 M.J. 154 (NMCMR 1981) (death sentence reversed for constitutional procedural infirmity, not for inappropriateness); *United States v. Hutchinson,* 15 M.J. 1056 (NMCMR 1983), *rev'd in part,* 18 M.J. 281 (C.M.A.1984) (summary disposition) (death sentence reversed for constitutional procedural infirmity, not for inappropriateness). We find these expressions of intent to be persuasive and discount any bar to approving the death sentence based on when the last time such a sentence was carried out.

Lastly, we address the contention that death serves no penal interest. The death penalty serves two social purposes: deterrence and retribution. *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-2930, 49 L.Ed.2d 859, 880. Appellant argues that deterrence can be accomplished with a life sentence and that retribution is irrational and has no place in the military justice system. We reject this argument.

As we previously noted, deterring serious criminal misconduct is of particular importance in the military because our ability to fulfill our mission is directly related to the discipline of our forces. In order for deterrence to be effective, we believe the full range of punishments for a particular offense ought to be available and that the punishment should be tailored to the individual and the circumstances of the offense.

Contrary to appellant's assertion, retribution has a place in our system of justice. In *Gregg,* Justice Stewart, in discussing retribution noted:

> [C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This

> function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

*Id.* 428 U.S. at 183, 96 S.Ct. at 2930, 49 L.Ed.2d at 880.

Justice Stewart further noted in *Gregg* a speech on capital punishment given by Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, in which it was stated:

> The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.

Royal Commission on Capital Punishment, minutes of Evidence, Dec. 1, 1949, p. 207 (1950).

In this case, we view the crimes committed by Curtis to be heinous and outrageous. The slaying of Lieutenant Lotz, Curtis' officer-in-charge, and Mrs. Lotz in their quarters aboard a military base and the manner in which these killings were accomplished convinces us that the death sentence is clearly proper. We do not arrive at this lightly and have carefully considered all of the circumstances surrounding the offenses and all evidence of extenuation and mitigation. Taking all of these factors into consideration, we find the sentence to death to be appropriate in this case.

**IX**

**Decision**

We have carefully examined the record of trial, the clemency request, the assignments of error and the Government's reply therto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the



substantial rights of the appellant was committed. We are convinced of appellant's guilt of all of the charges and specifications beyond a reasonable doubt and specifically find the sentence to be appropriate. Article 66(c), Uniform Code of Military Justice.

Accordingly, the findings and sentence, as approved on review below, are affirmed.

Senior Judges COUGHLIN and RILEY, and Judges McLERAN, MIELCZARSKI, JONES and RUBENS concur.

BYRNE, Chief Judge (concurring/dissenting):

I believe life imprisonment, not death, is the appropriate penalty in this case.

The racial stereotyping, by one of the two murder victims, precipitated appellant's violent acts. *See, e.g.*, R. 591, 602-605.

This fact is vital because a matrix of contexts circumscribes when the death penalty is appropriate in the Naval Service. A Marine has not been executed since 1817.[1] There are strong religious and moral factors weighing against imposition of this ultimate sanction. Concern with racial prejudice in sentencing underlies the Supreme Court's rationale in *Furman v. Georgia.*[2] The Supreme Court has fenced in the death penalty with unique constraints limiting its imposition— in contrast to other lawful, imposable punishments.[3] Consequently, before any system of

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[1] Solis, LCOL Gary D., *Marines and Military Law In Vietnam: Trial by Fire* (Working Draft) History and Museums Divisions, Headquarters, U.S. Marine Corps.

[2] *See, e.g., Furman v. Georgia,* 408 U.S. 238, 251-53, 363-367, 92 S.Ct. 2726, 2732-33, 2763, 2789-91, 33 L.Ed.2d 346, 355-57, 390, 420-22.

[3] In *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), Justice Stewart stated:

> While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual

criminal justice in this land executes the death penalty, its rationale for doing so must be capable of withstanding withering

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punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 US, at 313, 33 LEd2d 346, 92 S Ct 2726 (concurring). Indeed the death sentences examined by the Court in Furman were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For of all people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in Furman were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id. [408 U.S.] at 309-310, 33 LEd2d 346, 92 SCt 2726. (Stewart, J., concurring).

428 U.S. at 188, 96 S.Ct. at 2932, 49 L.Ed.2d at 883.

Later, Justice Stewart concluded:

> In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or caprcious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

428 U.S. at 195, 96 S.Ct. at 2935, 49 L.Ed.2d at 887.



scrutiny.[4] The crimes committed by the accused must "cry out" for death. The racial overtones in this case have silenced that cry, in my opinion.

I would affirm only so much of the sentence as provides for confinement for life, total forfeitures, a dishonorable discharge, and reduction to pay grade E-1.

In all other respects, I concur with Judge Strickland's opinion.

ALBERTSON, Judge (concurring in part/dissenting in part):

I concur with the majority on their resolution of all issues except those discussed in section's three and eight of the majority opinion. I dissent from their resolution of the assignment of error relating to the Presidential authority to promulgate Rule for Court-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), 1984, because I have concluded that, until Congress acts in an affirmative manner, the Article 118, Uniform Code of Military Justice (UCMJ), provision authorizing the imposition of the death penalty is constitutionally invalid as a result of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Even if I am incorrect in that conclusion, I further conclude that the delegation of authority by the Congress to the President to promulgate R.C.M. 1004(c) was absolutely impermissible and as presently set forth in Article 36, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836, does not include sufficient standards to guide the Presi-

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[4] Professor of Law George E. Dix commented in a Georgetown Law Journal article regarding appellate review of death sentences:

> Such a review implicitly includes an evaluation of whether reasonable persons would regard the death sentence as disproportionate to the offender's culpability, given the nature of the crime committed, the circumstances of its commission, and possible influences upon the defendant.

PIX, George E., "Appellate Review of the Decision To Impose Death," 68 Geo.L.J. 93, 107.

dent, in accordance with the principles set forth in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), to promulgate R.C.M. 1004(c).

R.C.M. 1004 enunciates the only procedures and aggravating factors within the military justice system (except for Article 106a, UCMJ) for determining the appropriateness of the imposition of the death penalty. R.C.M. 1004 was promulgated in light of the suggestion of the United States Court of Military Appeals decision in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) which in turn was based upon the United States Surpeme Court decision in *Furman v. Georgia*. Thus, I do not contest the finding of my Brothers in the majority that the procedures set forth in R.C.M. 1004(a), (b), (d) and (e) meet the requirements the Supreme Court mandated before imposition of the death penalty could be considered constitutional. I believe, however, that the only Governmental authority that can identify, at least as they relate to aggravating factors, (*i.e.*, R.C.M. 1004(c)) and effectuate the standards for impositon of the death penalty in accordance with the Supreme Court's mandate within the military justice system, as it is presently established, is the United States Congress. While Congress might be able to delegate the *Furman* mandate, it can only do so after meeting certain criteria, *United States v. Mistretta*, — U.S. —, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) citing *American Power and Light Co. v. SEC*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946),[1] which, at this point in

[1] As quoted in the recent Supreme Court decision of *Mistretta v. United States*, __ U.S. __, __, 109 S.Ct. 647, 652-54, 102 L.Ed.2d 714 (1989): "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibliity and practicality, which will enable it to perform its function.' *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 55 S.Ct. 241, 248, 79 L.Ed. 446 (1935). Accordingly, this Court has deemed it 'constitutionally sufficient' if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power and Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946).



time, it has not met. accordingly, I find that the imposition of the death penalty upon a military accused convicted within the military justice system is unconstitutional under the principles announced in *Furman v. Georgia*, (hereinafter *Furman*) and *United States v. Mistretta*. I shall explain in more detail below. With regard to the eighth assignment of error, the appropriateness of the imposition of the death penalty in appellant's case, I dissent only because I cannot reach a consideration of that issue since I am not convinced that the death penalty is a valid punishment or that the guidelines set forth in R.C.M. 1004(c) are authorized and appropriate guidelines.

**I.**

***Furman v. Georgia***

*Furman* declared that existing state capital punishment statutes violated the Eighth Amendment because they permitted exercise of uncontrolled discretion by sentencing authorities in determining whether to impose capital punishment in any specific case. *United States v. Matthews*, 16 M.J. at 369. Subsequently in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. at 2920, 49 L.Ed.2d at 859 (1976) (hereinafter *Gregg*), the Supreme Court examined the new (post-*Furman*) Georgia statute which retained the death penalty for six categories of crime. In addition to the six categories of crime for which the legislature retained the death penalty, the Georgia legislature also adopted new trial procedures and capital sentencing guidelines that it mandated be followed before imposition of the death penalty upon one convicted of a capital offense was authorized. For example, the Georgia statute established a bifurcated trial, including a separate sentencing stage wherin evidence in aggravation, extenuation, and mitigation of the crime was presented. Additionally, the judge was required to instruct the jury as to any of 10 statutory aggravating circumstances that were supported by the evidence and that it,

the jury, must find, and specify, at least one of the ten aggravating circumstances beyond a reasonable doubt before they could adjudge the death penalty. Finally, the new statute required expedited and automatic direct review by the state supreme court.

The Supreme Court upheld the new Georgia statute as passing constitutional muster because the jury's attention had been focused "on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg,* 428 U.S. at 206, 96 S.Ct. at 2940, 49 L.Ed.2d at 893. In particular the Court was impressed with the channeling of the jury's discretion such that the jury could not impose the death sentence in a wanton and freakish manner. The Supreme Court arrived at the same conclusion with regard to Florida's reenacted statute. *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

## II.

### Impact of *Furman* On Article 118, UCMJ

What, then, is the status of Article 118, UCMJ? In 1950 Congress enacted Article 118, Uniform Code of Military Justice, 10 U.S.C. § 118. That article defines the offense of murder within the military community. Within that statute Congress identified four specific types of murder of which two, premeditated murder [Article 118(1)] and murder committed during the commission of certain felonies [Article 118(4)], were designated capital offenses. The other two types of murder, death as a result of an act done with the intent to kill or inflict great bodily harm [Article 118(2)] and death resulting from an act inherently dangerous to others [Article 118(3)], were designated as offenses punishable "as a court-martial may direct."[2] *See* R.C.M. 1003(b).

[2] The legislative history to Article 56, UCMJ, wherein the Congress gave the President broad authority to set the maximum punishment for offenses which a court-martial may direct and which a court-martial could not thereafter exceed when directing punishment, clearly reveals that Congress never intended the President to deal in any way with the death penalty. In fact, the hearings relating to Article 56, in particular reveal concern that the wording of the provisions be carefully articulated so that assurance could be had that the President could never make an offense a capital offense that the Congress itself had not declared capital. Index and Legislative History of the Uniform Code of Military Justice, HH at 1187.



Offenses punishable "as a court-martial may direct" have generally been understood to carry any punishment exclusive of death, *see, e.g.,* para. 127(c), (Article 118) MCM, 1969; para. 43(e), Part IV, MCM, 1984, and exclusive of those punishments deemed cruel and unusual under Article 55, UCMJ, Article 118 has not been amended since the enactment of the UCMJ. Thus, Article 118 is a pre-*Furman* statute.[3]

The next step is to determine what impact the Supreme Court's decisions in *Furman* and *Gregg* have on pre-*Furman* statutes, such as Article 118, in which the death penalty is authorized but fails to set forth *Furman-Gregg* type guidelines.[4] In other words, what is the status of Article 118 in view of *Furman*?

[3] By analogy then, Article 118—and any other death penalty offenses within the UCMJ, with the exception of Article 106a—should be in the same status as those state statutes which *Furman v. Georgia* declared unconstitutional. Since *Furman*, at least 35 of those states having *Furman*-invalidated statutes, have, through the positive action of their legislatures, taken action to reinstate the death penalty for some offenses and provide the guidelines required by *Furman. E.g., Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

[4] We do recognize, as the Court of Military Appeals did in *Matthews,* that many of the procedures within the military justice system, such as a bifuracted trial and the opportunity to present aggravating, extenuating and mitigating evidence on sentencing, probably meet some of the Supreme Court's concerns. The court-martial process did not, however, address the concept of finding and weighing aggravating and mitigating factors by some identified standard such that unfettered, and possibly discriminatory, discretion was not controlled.

I believe the concurring and dissenting opinions in *Furman* clarify its impact on Article 118's status.[5] First, let us look at the concurring opinions that provide the narrowest grounds for the majority's opinion. Justice Stewart concurred in reversing Furman's sentence to death because he believed that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S.Ct. at 2763, 33 L.Ed.2d at 390. Justice White, also concurring, stated:

> . . . [A]s the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.
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> . . . . . .
>
> In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may

[5] We must look at the various concurring and dissenting opinions to attempt to elicit the intended impact of *Furman* because no unified majority opinion explaining the result was arrived at by the Court. Accordingly, what other way can we determine the exact intent of the Court other than to glean from the concurring and dissenting opinions what the Court as individuals believed was the impact of the decision. *See Gree v. Georgia*, 428 U.S. at 169, n. 15, 96 S.Ct. at 2909 n. 15, 49 L.Ed.2d at 859, n. 15 (1976); *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); Annotation, "Supreme Court's Views on Constitutionality of Death Penalty and Procedures Under Which It Is Imposed." 51 L.Ed. 886; Annotation, "Binding Effect Upon State Courts of Opinion of United States Supreme Court Supported by Less Than Majority of All Its Members." 65 ALR3d 504.



> refuse to impose the death penalty no matter what the circumstances of the crime. Legislative "policy" is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment.

408 U.S. at 313-314, 92 S.Ct. at 2764, 33 L.Ed.2d at 392-393.

Now let us turn to the dissenters. Chief Justice Burger stated in his dissent:

> The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems clear: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past.

408 U.S. at 397, 92 S.Ct. at 2807, 33 L.Ed.2d at 440.

The Chief Justice went on to say:

> While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant *statutory* changes will have to be made. . . . (Emphasis added.) [L]egislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.

408 U.S. at 400, 92 S.Ct. at 2809, 33 L.Ed.2d at 442. Finally, the Chief Justice stated:

> Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, *the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress.* (Emphasis added.) While I cannot endorse the process of decision making that has yielded today's result and the restraints that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.

408 U.S. at 403, 92 S.Ct. at 2811, 33 L.Ed.2d at 444. Also dissenting was Justice Powell who wrote:

> Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degrees by five members of the Court, *today's departure from established precedent invalidates a staggering number of state and federal laws.* (Emphasis added.) The capital punishment laws of no less than 39 States (footnote omitted) and the District of Columbia are nullified. In addition, *numerous provisions of the Criminal Code of the United States and of the Uniform Code of Military Justice also are voided.* (Emphasis added.) The Court's judgement not only wipes out laws presently in existence, but denies to Congress and to the lesiglatures of the 50 States the power to adopt new policies contrary to the policy selected by the Court. . . .



> [T]he impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitable conduct. It is the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped.

408 U.S. at 462-463, 92 S.Ct. at 2840, 33 L.Ed.2d at 418.

Justice Blackmun, dissenting, found:

> Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided. No longer is capital punishment possible for [various federal crimes listed in Title 18 U.S.Code]. Also in jeopardy, perhaps, are the death penalty provisions in various Articles of the Uniform Code of Military Justice. 10 USC §§ 885, 890, 894, 901, 904, 906, 913, *918*, and 920. (Emphasis added.) All these seem now to be discarded without a passing reference to the reasons, or the circumstances, that prompted their enactment, some very recent, and their retention in the face of efforts to repeal them.

408 U.S. at 412, 92 S.Ct. at 2815, 33 L.Ed.2d at 449.

From these dissents, it would appear that at least four justices of the Supreme Court believed that *Furman* declared all state and federal statutes, including the UCMJ, null and void if they authorized the imposition of the death peantly but did not meet the standards identified by *Furman.*[6] The Ninth Circuit Court of

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[6] Even though three of the justices who participated in *Furman* are no longer members of the Court, six of the *Furman* Court do remain and might

Appeals was compelled to reach the same conclusion in *United States v. Harper,* 729 F.2d 1216 (9th Cir.1984). In fact, it based it conclusion on the position not only of petitioner, but also of the Government, whose brief on this issue in the district court stated that Title 18 U.S.C. § 794's death penalty provision is:

> . . . uneforceable and void because it sets forth no *legislated* guidelines to control the fact-finder's discretion. (Emphasis added.) The Department of Justice has long been of the view that *Furman* rendered section 794's death penalty provision unconstitutional. *See Imposition of capital Punishment:* Hearings on S. 1, S. 1400, and S. 1401 Before the Subcomm. on Criminal Laws and Procedures of the Comm. of the Judiciary, 93d Cong., 1st Sess. 43 (1973) (statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice); To Establish Constitutional Procedures for the Imposition of Capital Punishment: Hearings on S. 1382 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 95th Cong., 1st Sess. 22 (1977) (statement of Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice); Capital Punishment: Hearings on S. 114 Before the Comm. of the Judiciary, 97th Cong., 1st Sess. 22 (1981) (statement of D. Lowell Jensen, Assistant Attrorney General, Criminal Division, Department of Justice). Moreover, the Senate has recently

continue to represent a majority should the constitutionality of Article 118's death penalty be presented. In playing the numbers game then, we know that of those six remaining justices, two justices would declare the death penalty unconstitutional per se; one justice would not declare the death penalty unconstitutional per se but would declare discretionary statutes unconstitutional; and four justices believe the *Furman* decision declares the death penalty statutes in existence at the time of the opinion null and void.



> passed a bill, supported by the Justice Department, that would authorize the imposition of the death penalty for certain crimes, including espionage. S. 1765, 98th Cong., 2d Sess., 130 Cong.Rec.S. 1491-93.
>
> In light of the above, we believe it clear that the death penalty provision of the espionage statutes is unconstitutional. It cannot be saved by judicial formulation of the missing, but essential, statutory guidelines.

729 F.2d at 1225-6. *See McKenzie v. Risley,* 801 F.2d 1519 (9th Cir.1986), *cert. denied* __ U.S. __, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).

Additionally, the decisions of the federal circuit courts, *e.g., United States v. Watson,* 496 F.2d 1125, 1129 (4th Cir.1973) and *United States v. McNally,* 485 F.2d 398 (9th Cir.1973) (*en banc*), reflect the two differing rationales state and federal courts have utilized for analyzing the continuing constitutional validity of statutes related to the imposition of the death penalty in light of *Furman.*[7] *Watson* sides with the classification rationale while *McNally* reflects the penalty rationale.[8]

[7] Annotation, "Effect of the Abolition of Capital Punishment on Procedural Rules Governing Crimes Punishable by Death—Post-*Furman* Decisions." 71 A.L.R.3d 454, 457-460.

[8] The *Watson* court was concerned with the impact of *Furman* on a federal statute that gave the defendant a procedural right to two attorneys if he faced the possibility of the imposition of the death penalty. Since it was unable to determine that the sole reason Congress gave the accused the procedural right in question was because of the possibility of the imposition of the death penalty, a possibility that no longer existed, it refused to hold the procedural right inapplicable to a defendant convicted under the statute which Congress had done nothing about since *Furman.* Thus, *Watson* looked at the death penalty provision as a not only a penalty provision that may or may not be capable of imposition but as a means for classifying an

These judicial decisions shed some light on how we might interpret the status of Article 118 as a whole, or the status of its provision authorizing imposition of the death penalty in particular. The courts that follow the classification rationale hold that the statutes identifying offenses as "capital offenses" established a category of offenses that because of their gravity remained classified as "capital offenses." That being so, all statutes that interrelated to a "capital offense" statute remained operative if a capital offense was involved. The courts using the penalty ratio-

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offense as one of the most severe types of offenses.

> We have no doubt that *Furman* raises pointed legislative questions of whether section 3005 should not be repealed or whether the various provisions of Title 18 which purport to authorize the imposition of the death penalty should be amended in an effort to harmonize them or to validate them under *Furman*. . . . But we conceive these to be legislative questions and not judicial ones, especially when a holding by us that *Furman* has effected a repeal of section 3005, of necessity, would probably create serious doubt as to whether the various other provisions of Title 18 and the Federal Rules of Criminal Procedure, to which we have referred, have also been repealed. The question of whether these statutes and the rule should now be repealed merits the prompt consideration of Congress and the Rules Committee, but we regard our role as one of proceeding with caution unless and until it unmistakably and clearly appears that *Furman* has had this effect. This, we fail to find.

*Watson*, 496 F.2d at 1129-1129. The Court then held that the defendant had the statutory right to have two attorneys because he was facing conviction for a crime that authorized the death penalty even though the imposition of the death penalty under federal law as it existed at that time was ineffectual.

*McNally*, on the other hand, determined that when the death penalty has been determined by a court or the prosecution not to be appropriate because of *Furman*, "the case lost its capital nature" and the defendant was not entitled to the advantage of any procedure which was otherwise required in the prosecution of a capital offense. *McNally*, 485 F.2d at 407. Thus, *McNally* looked at the death penalty provision as solely a penalty provision.



nale declare that since capital punishment provisions were no longer constitutional unless they met current schemes offered by the judiciary, the "capital offense" no longer existed. Thus, any legislation that was triggered by the possibility of imposition of the death penalty was not operative until that penalty was again constitutionally imposable. Hence, while the death penalty may be authorized by the legislature, its imposition is constitutionally prohibited; the authorization provision is invalid.

I can accept the penalty rationale more readily then I can the classification rationale because of the concept of severability. It is well-established that a statute may be constitutional in part and unconstitutional in another; and, as long as the unconstitutional provision is severable from the rest of the statute, the constitutional provision will stand with its unconstitutional aspect rejected. *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). But regardless of which rationale one accepts, I believe little argument remains with the fact that *Furman*, at the very least, declared all provisions of statutes authorizing imposition[9] of capital punishment existing at the time of the decision ineffectual. *Gregg v. Georgia*, 428 U.S. at 153, 96 S.Ct. at 2920; *Watson*, 496 F.2d 1125; *In re Ex Parte Bynum*, 294 Ala., 78, 312 So2d 52 (1975).

All of this precedent tells me that the federal and state courts have exercised caution when called upon to interpret the impact of *Furman* on a statutory authorization for imposition of the death penalty. Where legislatures have not specifically and affirmatively indicated their intent since *Furman* to authorize imposi-

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[9] The key word here is "imposition". *Furman*, at the very least, declared imposition of the death penalty outside its guidelines unconstitutional. The death penalty was still authorized but its imposition, the ability to effectuate it, was possible only after the development of specific and controlled discretionary guidelines and procedures and the application of those guidelines and procedure by the authorized fact-finder.

tion of the death penalty by reenacting, reinstating, modifying, or, in some other permissible way, validating the authorization provision in question, these courts have also exercised caution when they have had to determine the applicability of statutes that grant or deny a defendant a procedural right that is dependent upon him facing the possibility of the imposition of the death penalty. In light of this exercise of caution, I believe this Court should also exercise caution in interpreting legislative inaction or implicit ratification of the U.S. Congress when determining whether Article 118's authorization for the imposition of death remains valid since the decision in *Furman.* Although appellate courts act on the presumption of constitutionality of statutory provisions, because the case law since *Furman* has not made it unmistakably clear to me that Article 118's death penalty authorization provision is constitutional, I cannot find that it is constitutional. *See United States v. Watson,* 496 F.2d 1125, 1129 (4th Cir.1973). If it is not a constitutionally valid provision because Congress has not affirmatively demonstrated its reinstatement of that penalty provision, let alone given the guidelines required by *Furman-Gregg,* then the imposition of the death penalty within the military justice system is unconstitutional.

### III.

#### Presidential Effectuation Of An Invalid Statutory Provision

Let us presume, however, that Article 118's provision authorizing the death penalty is not void but merely ineffectual. How can it be effectuated? In this particular case, can the President pursuant to Article 36, UCMJ, effectuate, *i.e.*, make consitutionally permissible, Article 118's authorization for imposition of the death penalty, by promulgating R.C.M. 1004?

In *United States v. Matthews,* 16 M.J. at 354, the Court of Military Appeals held that the sentencing standards then existing under the UCMJ were defective because they failed "to require



that the court members make specific findings as to individualized aggravating circumstances—findings which can, in turn, be reviewed factually and legally." *Id.,* at 380. In dicta the Court then indicated how the defective sentencing standards could be corrected:

> Congress can take action to remedy this defect that now exists in the sentencing procedure employed by courts-martial in capital cases. However, corrective action also can be taken by the President in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers expressly delegated to him by Congress. *See* Article 36, UCMJ, 10 U.S.C. § 836.

The Court further expounded on its theory that the President could take the corrective action needed:

> The congressional delegation of powers to the President has traditionally been quite broad in the field of military justice. Pursuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes, the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. (Footnote omitted.) However, as contemplated by Article 56, of the Uniform Code, 10 U.S.C. § 856, the President prescribes maximum punishments for the various offenses. (Citation omitted.) The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases. *Cf. Youngstown Sheet and Tube Co. v. Sawyer,* 343

> U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). Indeed, a proposed revision[10] of the Manual for Courts-Martial, which [is] . . . R.C.M. 1004 . . . prescribes special procedures for sentencing in capital cases.

*Matthews*, 16 M.J. at 380-381. (Footnote added).

The President heeded the *Matthews* dicta and promulgated R.C.M. 1004. Despite our surpervisory court's dicta in *Matthews*, and its apparent anticipatory sanction of the President's action, I believe there is a separation of powers issue that the Court of Military Appeals may not have considered at the time. Additionally, I believe significant case law addressing the separation of powers issue has been decided since *Matthew, see Mistretta v. United States*, __ U.S. __, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986); *United States v. Harper*, 729 F.2d 1216 (9th Cir.1984), that impacts upon the continued validity of the dicta such that it may reexamine *Matthews*. *See United States v. Carter*, 25 M.J. 471, 473 (C.M.A.1988).

Elementary civics teaches us that:

> . . . the executive department, like the judicial, must yield in most matters to the creative power of the legislature (footnote omitted); the legislature makes laws and the executive enforces them when made, and each department is, in the main, supreme within its own field of action (footnote omitted). The executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his

[10] The proposed revision of the Manual for Courts-Martial mentioned by the Court of Military Appeals in *Matthews* referred to what ultimately became Rule for Courts-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), 1984.



> conduct is tantamount to a repeal (. . . *Henry v. State*, 10 Okla.Crim. 369, 136 P. 982), enactment (*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 72 .Ct. 863, 96 L.Ed. 1153 . . . ;) variance, or enlargement (*Whitcomb Hotel, Inc. v. California Employment Com.*, 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405; *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797, *cert. den.* and *app dismd* 280 U.S. 517, 50 S.Ct. 66, 74 L.Ed. 587, and *cert. den.* and *app dismd* 280 U.S. 517, 50 S.Ct. 66, 74 L.Ed. 588). Thus, the President of the United States has no authority, even under the clause requiring him to see that the laws are faithfully executed, to suspend of his own motion the operation of acts of Congress (*Kendal v. United States*, 37 U.S. 524, 9 L.Ed. 1181).

16 Am.Jur.2d sec. 305 at 821-822.

Just as the President cannot legislate, neither can the courts by judicial construction. *See United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). As the majority notes in its equal protection discussion: "In *Gregg* the Supreme Court reasoned that because of the complex issues involved in determining the moral values of society and the social utility of the death penalty, it is particularly within the province of the legislature to establish the degree of punishment for certain classes of crime." This, for me includes, factors that differentiate capital murder from non-capital murder.

Whether an unconstitutional provision of a death penalty statute can be subsequently effectuated with corrective action has been answered affirmatively by *Gregg v. Georgia*, 428 U.S. at 206, 96 S.Ct. at 2940, and *Profitt v. Florida*, 428 U.S. at 242, 96 S.Ct. at 2960, when the Supreme Court approved new statutes enacted by the state legislatures subsequent to *Furman*. The new legislation reaffirmed the legislative policy of the appropriate-

ness of the imposition of the death penalty as to certain categories of crime and channeled the decisionmaking for imposition of the death penalty by establishing certain specified aggravating factors and several procedural safeguards. Positive action to establish or reaffirm policy and to establish standards for channelling decision-making in an attempt to make law as to crime and punishment in compliance with the Constitution is beyond question the sole province of the legislature. *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76 (1820). As with many of Chief Justice Marshall's opinions, the principle he enunciated about the power to legislate being within the sole province of the legislature has remained good law through the years. *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1954); *United States v. Evans*, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *Howell v. Mississippi*, 300 So.2d 774 (1974).

My Brothers give four reasons for their belief that the President can validate the ineffectual provisions of Article 118. First, they rely on the Congressional enactment, unchanged since 1951, of Article 36, UCMJ, which they believe delegates to the President that authority:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be



> reported to Congress.[11]

Second, they rely on what they consider the expression of congressional intent with regard to the President's authority to set punishments, including the death penalty, as explicitly set forth in Article 56, UCMJ: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."[12] The third reason is what they believe is recognition of the authority of the President to do so by the Court of Military Appeals in their decision in *Matthews*, 16 M.J. at 354; the President's implementation of that advice; and the Congressional ratification, albeit *sub silentio*, of the provision in question.[13] Finally, the majority believes that the President has been properly delegated broad authority to effectuate Article 118's death penalty provision because the President's authority as Commander-in-Chief of the Armed Forces is based upon a long-standing special relationship with the Congress, an historical relationship so unique from any other, that he alone has the expertise to determine what is necessary to maintain morale and discipline within the military. This special relationship, they conclude, enables the President to meet the *Furman* mandate better than any other mechanism.

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[11] Some of my Brother judges believe that the President has merely "applied the principles . . . recognized in the trial of criminal cases in the United States district courts, . . ." and that those principles are the guidelines established by the Supreme Court in *Furman* and *Gregg*. My counter-argument is that the courts, including the United States Supreme Court, have recognized that they cannot legislate. *United States v. Harper*, 729 F.2d 1216 (9th Cir.1984); *see e.g., Furman*, 408 U.S. at 398, 92 S.Ct. at 2808 (Burger, C.J., dissenting).

[12] The Table of Maximum Punishments, paragraph 127(c), Manual for Courts-Martial, 1951, and 1969, show the President referring to Article 118 for a definition of the maximum punishment permitted for murder rather than him stating it in his own terms as the maximum sentence permissible.

[13] Provisions of the Manual for Courts-Martial made pursuant to Article 36, UCMJ, must be reported to Congress. Article 36(b), UCMJ.

I do not accept those reasons because of two long standing principles: (1) Congress cannot delegate its legislative power to the President (the nondelegation principle); *Marshall Field and Co. v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892);[14] and (2) penal rules must be strictly construed.[15]

In *United States v. United Verde Copper Co.*, 196 U.S. 207, 25 S.Ct. 222, 49 L.Ed. 449 (1905), the Supreme Court applied the nondelegation principle to the executive branch. In *United Verde* the Secretary of the Interior had established regulations under the supposed authority of Congress to implement an act of Congress. In doing so, he tried to give "an authoritative and final construction of the statute" and in doing that the Court said:

[14] Two important facts to remember in this regard are the constitutional provisions speaking about the legislative and executive branch responsibilities toward the armed forces. Article I, section 8, clause 14 states that "The Congress shall have the Power . . . To make Rules for the Government and Regulation of the land and naval Forces." Article II, section 2 states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ."

[15] "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. (U.S.) 76, 95, 5 L.Ed. 37, 42 (1920); *Furman v. Georgia*, 408 U.S. at 452-453, 92 S.Ct. at 2835-36 (Powell, J., dissenting). Additionally, "[t]he Supreme Court is most likely to reject broad delegations of congressional power, typically on statutory grounds, when action of the government agency claiming delegated power touches constitutionally sensitive areas of substantive liberty." Tribe, AMERICAN CONSTITUTIONAL LAW, (2d Edition, 1988) at p. 365. What more constitutionally sensitive area of substantive liberty can there be than an individual's life? *See California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) and cases cited in n. 9, *e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 117-8, 102 S.Ct. 869, 877-8, 71 L.Ed.2d 1 (1982).



> If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation: it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary.

196 U.S. at 212, 25 S.Ct. at 225.[16]

In *Reid v. Covert*, 354 U.S. 1, 38-39, 77 S.Ct. 1222, 1241-42, 1 L.Ed.2d 1148, 1172 (1957), the President's authority to act in his capacity as Commander-in-Chief with regard to the administration of military justice specifically was addressed:

> It must be emphasized that every person who comes within the jurisdiction of courts-martial is subject to

[16] In *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), the Supreme Court upheld the action of the Secretary of Agriculture's use of his legislatively delegated powers in making criminal the violation of rules and regulations made and promulgated by him under the authority of a statute covering forest reservations. The Court reiterated that only Congress can legislate and quoting its previous opinion in *Marshall Field and Co. v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892) stated:

> The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside the halls of legislation.

*Grimaud*, 220 U.S. at 519, 31 S.Ct. at 484, 55 L.Ed. at 569. The Court then explained that while the act of Congress in question did not expressly declare the particular activity in question unlawful, the statutes involved did have encompassing terms ;and expressly stated that failure to comply with the rules and regulations of the Secretary would subject the offender to the penalty imposed by Congress.

military law—law that is substantially different from the law which governs civilian society. Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice. Moreover, it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war. . . . If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

In summary, "it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual. (Footnotes omitted). The President's authority as head of the executive branch and as Commander-in-Chief is, therefore, not unfettered authority.



*See also Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 671, 100 S.Ct. 2844, 2878, 65 L.Ed.2d 1010, 1052 (1980); *Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 543, 101 S.Ct. 2478, 2507, 69 L.Ed.2d 185, 222 (1981).

Using these principles to analyze the authority of the President by virtue of Article 36 to promulgate R.C.M. 1004, we must address two issues. First, anticipating that the Supreme Court's recognition that there are "inherent differences in values and attitudes [which] exist that separate the military establishment from the civilian society" might be considered a means by which the President could be "inferred" to understand "the intent" of Congress and thus allow him, under the rubric of his special relationship with Congress, to effectuate *Furman-Gregg* criteria for the imposition of the death penalty, let us examine Article 118 to see if there are inherent differences that would separate the former from the latter. In other words, do inherent differences in values and attitudes exist that separate the military from the civilian community such that imposition of the death penalty in the former and the not the latter is constitutionally permissible? I have no doubt that they do. But, I do doubt, that the differences, at least during peacetime, are so inherent that Congress need not itself establish *Furman-Gregg* criteria.[17]

I am not at all certain that murder, at least the two types of murder that concern us in appellant's case,[18] or even the particular circumstances surrounding the commission of that offense by this particular appellant as alleged, including the aggravating factors plead and found in the charge and specifications, identify

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[17] On the other hand, if we could identify a difference in values and attitudes, then, maybe, Presidential action in establishing the aggravating factors in R.C.M. 1004(c) would be justified.

[18] Premeditated murder (Article 118(1)) and murder during the commission of a felony (Article 118(4)).

any values or attitudes so different as to separate the military establishment from the civilian society. In fact, I believe the Court of Military Appeals has already addressed this issue.

In *United States v. Matthews*, 16 M.J. at 354, the Court recognized that circumstances might exist which would permit rules governing capital punishment to be different from those applicable to civilians. But, in Matthews' situation, the murder and rape of a civilian dependent, offenses which the court was unable to relate to military exigencies, the Court found:

> [N]o reason why Matthews should be executed for his [crimes] if the sentencing procedures used by the court-martial failed to meet the standards established by the Supreme Court for sentencing in capital cases in civilian courts. There is no military necessity for such a distinction; and we do not believe that applying lower standards in this case would conform to the intent of Article 55 or of the Eighth Amendment.

*Matthews*, 16 M.J. at 369.[19] The only difference between Matthews and appellant is that the President has since promulgated R.C.M. 1004. Otherwise, the offense of murder is the same.[20] Thus, I do not believe that sufficient differentiating values and attitudes have been adequately identified, let alone identified as inherent, to permit the death penalty to be effectuated by the President rather than by the Congress.

[19] Recognizing that the Court of Military Appeals made this statement in applying the principle to the issue of cruel and unusual punishment rather than a delegation of power issue, it would seem to me that the same type of justification would have to be used under an equal protection argument if proper authority did establish procedures for imposition of the death penalty for service members that differed from that of their civilian counterparts. I do not address, therefore, the issue of whether military status alone is sufficient to overcome any equal protection arguments to permit the imposition of the death penalty on service members and not civilians for offenses committed under the same nine similar circumstances.

[20] One could argue that the primary victim in appellant's case is his officer-in-charge and his dependent civilian wife while Matthews murdered a civilian dependent of an Army officer. The status of appellant's victim as officer-in-charge could have been one of the aggravating factors under the President's scheme but was not plead. Thus, the victim's officer status, which might have created that military significance, was not used by the Government at trial and cannot now be used as a means to differentiate appellant's case from Matthews' situation on the basis of a special need of the military.



## IV.

### *Is There A Proper Delegation?*

Even if, based on the facts of this particular case, those differentiating values and attitudes are identified adequately and are inherent to the military, the process by which that identification is validated must be by a proper delegation.[21] There is nothing in the congressional delegation in Article 36, UCMJ, that can be pointed to that would demonstrate that the identification of the differentiating values and attitudes was proper. *See United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *O'Neal v. United States*, 140 F.2d 908 (6th Cir. 1944).

It may well be true that the standards set forth in R.C.M. 1004 meet the guidelines set forth in *Gregg v. Georgia*, 428 U.S. at

[21] As we have previously noted, the military justice system is dependent upon both the legislative and executive branch for its creation and effectuation. *See* Footnote 14. Therefore, since Congress was endowed with the authority "to make rules and regulations for the governing" of the armed services, that Congress legislates and the President, as head of the executive branch and as commander in chief of the armed forces, enforces that legislation. Where Congress has failed to express an intent to require certain action, *e.g.*, require the taking of an oath to demonstrate bona fides at the time of submission of an application to an executive agency, the executive could not then prescribe that violation of the requirement would result in criminal penalty. *Williamson v. United States*, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278 (1907).

153, 96 S.Ct. at 1909, *e.g.*, aggravating factors and procedural safeguards are present; and, it would appear that the concerns of the Court of Military Appeals have been eliminated. But, the President's arbitrary promulgation of such rules without guidance from the legislature that results in the effectuation of an otherwise constitutional statutory provision is not a proper application of the delegation process. *See The Aurora v. United States*, 11 U.S. 382, 7 Cranch 382, 3 L.Ed. 378 (1813). In the numerous cases cited by the Supreme Court since *Aurora*, those that upheld a statutory delegation on grounds that the acts complained of were not a result of improper delegation, were based on statutes that had provided specific guidelines upon which the President was to base his action and which prevented the executive from taking what the courts considered arbitrary action; and most importantly, the President or a member of the executive branch took his action in accordance with those statutory guidelines. *See, e.g., Union Bridge Co. v. United States*, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523 (1907); *Marshall Field and Co. v. Clark*, 143 U.S. at 649, 12 S.Ct. at 495; *United States v. Gordon*, 580 F.2d 827 (5th Cir. 1978); *United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977). *See also* Annotation, "Validity of Statute or Ordinance Vesting Discretion in Public Officials without Prescribing a Rule of Action," 92 A.L.R. 400; Annotation, "Validity of Delegation to Drug Enforcement Administration of Authority to Schedule or Reschedule Drugs Subject to Controlled Substance Act (21 U.S.C. §§ 801 et seq.)," 47 A.L.R.Fed. 869.

In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), the Supreme Court established a three-stepped analysis to determine whether the President's authority, exercised in light of a congressional delegation, was too broad:

> . . . we look to the statute to see whether the Congress has declared a policy with respect to that subject, whether the Congess has set up a standard for the President's action, whether the Congress has required



> any finding by the President in the exercise of the authority to enact the prohibition.

293 U.S. at 415, 55 S.Ct. at 246, 79 L.Ed. at 456. The Supreme Court recently breathed new life into *Panama* in the realm of criminal punishments. *Mistretta v. United States*, — U.S. —, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Using *Panama's* three-stepped analysis as recently applied by *Mistretta*, I find Articles 36, 56, and 118 itself so deficient that reliance on an Article 36 delegation as a proper congressional delegation to the President for effectuating guidelines that would authorize the imposition of the death penalty within the military justice system is misplaced and improper. This is particularly so when such a delegation relates to the imposition of the supreme and ultimate penalty.[22]

First, I do not believe that Congress has set a policy with regard to the imposition of the death penalty for Article 118 since *Furman*. In fact, the only offenses for which the Congress has been able to obtain a consensus for imposition of the death penalty in appropriate circumstances have been in connection with air piracy [49 U.S.C.A. §§ 1472(i)(1)(B), 1472(n)(1)(B)] and espionage by military personnel [Article 106a, UCMJ, 10 U.S.C. § 906a]. *See Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988); *see also Thompson v. Oklahoma*, — U.S. —, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (O'Connor, J., concurring in judgment). My failure to presume that Congress has set a general death penalty policy is also based on recognition of the public controversy surrounding capital punishment, at least as to some offenses, and the reluctance of the federal courts and the United States Sentencing Commission to presume the will of

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[22] And, it is only to the imposition of the death penalty that my dissent applies. I offer no comment on the validity of the delegation with regards to other matters that may arise within the military justice system at a later time.

Congress in light of possible adverse congressional reaction. *See Gubiensio-Ortiz*, 857 F.2d at 1256.

Second, I do not believe that we can presume, as the majority would have us, that because of a presidential reporting requirement, the Congress has given tacit approval or has ratified the presidential promulgation of R.C.M. 1004. The Supreme Court has clearly stated that when "substantial restraints are being placed on constitutional procedures" and they are "in conflict with our long-accepted notions of fair procedures, such action must be based upon explicit, not implicit, authority. Such decisions cannot be assumed by acquiescence or non-action." *Greene v. McElroy*, 360 U.S. 474, 507, 79 S.Ct. 1400, 1419, 3 L.Ed.2d 1377, 1396-97 (1959). The *Greene* Court further enunciated the significance of explicit action on the part of Congress:

> They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized (citation omitted), but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with the authority to decide them.

*Id.* at 507, 79 S.Ct. at 1419, 3 L.Ed.2d at 1397.

In *Greene v. McElroy*, the petitioner's work opportunities were being severely limited by the Department of Defense without affording him a hearing that comported with "our traditional ideas of fair procedures." In appellant's case, he is being subjected to the imposition of the death penalty without being afforded the constitutional assurance that imposition of such an extreme penalty is a current policy adopted by the branch of government established to determine such policy.



Thus, I conclude that Congress has not set a policy with regard to imposition of capital punishment in the military justice system since *Furman*. I further conclude, upon examination of Article 86, that no standards were set by the Congress with regard to what factors the President should apply in determining when the imposition of the death penalty would be authorized. As to the third step in a *Panama* analysis, I could conclude that the Presidential finding requirement has been met, since only the President can order the punishment of death executed. R.C.M. 1207; *see* Article 7(a), UCMJ. Therefore, having failed to meet two of the three steps required by *Panama*, I find that the President's authorization of imposition of capital punishment pursuant to findings made in accordance with R.C.M. 1004 is based upon an unconstitutional delegation of authority.

## V.

### *Limitation Of Article 36, UCMJ*

Throwing caution to the winds, however, let's do some further analysis by assuming that Congress did establish a death penalty policy, at least with respect to Article 118, and did intend to delegate to the President under Article 36, UCMJ, the ability to correct provisions of the UCMJ held ineffectual until the *Furman* mandate was complied with. The congressional delegation must still be examined because it must be capable of proper application by the President. In order to ensure that proper application, the delegation must establish certain standards for the President to follow when he acts pursuant to the delegation.[23]

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[23] For example, compare Article 36, UCMJ (quoted *infra*) with the Federal Sentencing Commission Act wherein the Congress set forth categories for determining offenses, categories for determining categories of defendants, four purposes, three goals, and a specific tool, etc. *See*

I find ~~that the~~ standards enunciated by Congress are either non-existent or very restrictive. When one examines the judicial opinions addressing delegation after *Panama,* and in particular when one examines the delegation by Congress to the Sentencing Commission, as described at great length in *Mistretta,* one finds the standards enunciated by the Congress must be specific and detailed.[24]

Looking at Article 36, however, I fail to find such specific and detailed standards. I do find that the matters which Congress delegated to the President are very general and involve matters of procedure, not matters involving substantive law.[25] *Ellis v. Jacob,* 26 M.J. 90 (C.M.A. 1988); *United States v. Frederick,* 3 M.J. 230 (C.M.A. 1977). This fact provides another ground for my conclusion that R.C.M. 1004 is an improper basis upon which to authorize imposition of the death penalty.

The aggravating factors set forth in R.C.M. 1004(c) are matters of substantive law and not procedure. Two Supreme Court opinions serve as the judicial authority for this conclusionary statement. *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) and *California v. Ramos,* 463 U.S. 992, 108 S.Ct. 3446, 77 L.Ed.2d 1171 (1988).

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*Gubiensto-Ortiz v. Kanahele,* 857 F.2d at 1245, *see also* Annotation "Validity of Delegation to Drug Enforcement Administration of Authority to Schedule or Reschedule Drugs Subject to Controlled Substances Act (21 USC §§ 801 et seq.)," 47 ALR Fed 869.

[24] Sentencing Reform Act of 1984, as amended 18 U.S.C. § 3551 *et seq.* (1982 ed., Supp. IV), and 28 U.S.C. §§ 991-998 (1982 ed., Supp. IV).

[25] While we believe rules of evidence involve substantive law, the congressional delegation is a little more specific in that it directs the President to adopt rules that apply to trials in federal district courts—which we recognize as the Federal Rules of Evidence, rules enacted by the Congress, and upon which the Military Rules of Evidence were based, with some modification, due to the needs of the military law practice. Appendix 22, Analysis MCM, 1984.



In *Bullington* the Supreme Court referred to the Missouri statute that enacted death penalty legislation after the *Furman* decision as containing "substantive standards to guide the discretion of the sentencer" and affording "procedural safeguards to the convicted defendant." 451 U.S. at 433, 101 KS.Ct. at 1853, 68 L.Ed.2d at 275.[26] The statute that the *Bullington* court examined had two separate provisions. One addressed purely procedural

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[26] I disagree with the Government's contention and the majority's interpretation that the Supreme Court considered the aggravating factors procedural matters in *Dobbert v. Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). The *Dobbert* Supreme Court was addressing the factual situation involving a change in the role of the judge and jury in the imposition of the death penalty. I agree that the change in the roles made by the Florida legislature involved procedural matters; but, a determination that a change in role is procedural is far different from determining that the identification of certain factors are sufficiently aggravating as to make an individual eligible for the judge or jury to impose the death penalty is also a procedural matter. Additionally, the Florida statute had previously passed constitutional muster, both as to the aggravating factors to be considered and the procedural application of determining the presence of aggravating factors before imposition of the death penalty was authorized *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.,* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

Additionally, the Florida statute, which not only changed the role of judge and jury, but also identified aggravating factors which had to be found before the death penalty could be imposed, was enacted by the legislature and not by someone in the executive acting under a delegation of authority. Thus, no separation of power—improper delegation or usurpation of authority—issue was or could be raised by the defendant in *Dobbert.* The only issue of concern for the Court was whether the change in the Florida statute violated *ex post facto* principles. The statutory changes served to ameliorate the appellant's potential for imposition of the death penalty because it provided "significantly more safeguards to the defendant than did the old. . . . Hence, viewing the totality of the procedural changes wrought by the new statute, we conclude that the new statute did not work an onerous application of an *ex post facto* change in the law." 432 U.S. at 295-6, 97 S.Ct. at 2301, 53 L.Ed.2d at 358.

issues, such as the requirements for a bifurcated trial, the jury's requirement to hear additional evidence in extenuation, mitigation, and aggravation. Additionally, this provision provided the judge with guidelines as to what he was to instruct the jury and his role in the proceedings after jury had made its decision. The second provision of the statute dealt with the legislature's specification of 10 aggravating and 7 mitigating circumstances which the jury had to find in writing and be convinced beyond a reasonable doubt that "any aggravating circumstances or circumstances that it finds to exist are sufficient to warrant imposition of the death penalty." *Bullington*, 451 U.S. at 434, 101 S.Ct. at 1853, 68 L.Ed.2d at 276. After careful analysis of *Bullington*, I believe the Court's "procedure" label—as interpreted by appellate Government counsel in their argument before this court—was meant to apply to the change in procedure caused by the new legislation, *i.e.*, the new state statute gave the jury rather than the judge the responsibility for determining the presence of the statutorily created aggravating factors. The Court's "procedure" label had nothing to do with the establishment of the aggravating factors themselves. I base this conclusion on the fact that the Court expounded on its determination that the provisions of the statute almost equated to a trial on the merits, particularly with the use of the beyond a reasonable doubt standard. "By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.' " 451 U.S. at 444, 101 S.Ct. at 1858, 68 L.Ed.2d at 282. As a result the Court stated that "it is the State, not the defendant, that should bear 'almost the entire risk of error.' " 451 U.S. at 446, 101 S.Ct. at 1859, 68 L.Ed.2d at 283. It thus held that the State was not entitled, at defendant's second trial, to attempt to prove the aggravating factors it had failed to prove at his first sentencing hearing since he had, in reality, been found not guilty beyond a reasonable doubt of those aggravating factors. R.C.M. 1004 is almost identical to that Missouri statute,



except for the specific agggravating and mitigating factors listed in the Missouri statute. Indeed, the Ninth Circuit Court of Appeals, *en banc*, recently held that Arizona's statute requiring the finding of aggravating factors beyond a reasonable doubt was unconstitutional because it placed with the trial judge the duty of finding the aggravating factor when it should have been the duty of the jury. The Court determined it should be the jury's decision because the aggravating factors were like elements of the offense. As such the defendant was entitled, in light of the Sixth Amendment, to a jury determination of the existence of those aggravating factors. *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988).

In *California v. Ramos*, Justice O'Connor, writing for a majority Court explained the Court's present interpretation of *Gregg*:

> In *Gregg* itself, the joint opinion of Justices STEWART, POWELL and STEVENS concluded that the Georgia sentencing scheme met the concerns of *Furman* by providing a bifurcated proceding, instruction on the factors to be considered, and meaningful appellate review of each death sentence. (citation omitted.) Satisfied that these *procedural* (emphasis added) safeguards "suitably directed and limited" the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action," (citation omitted), the joint opinion did not undertake to dictate to the State the particular *substantive* (emphasis added) factors that should be deemed relevant to the capital sentencing decision. Indeed, the joint opinion observed: "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (Citation omitted.) ("The deference we owe to the deci-

sions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy' "). (Footnote: Moreover, in approving the sentencing schemes of Georgia, Florida, and Texas, the joint opinions of Justices Stewart, POWELL, and STEVENS did not substitute their views for those of the state legislatures as to the particular *substantive* (emphasis added) factors chosen to narrow the class of defendants eligible for the death penalty. . . .)

It would be erroneous to suggest, however, that the Court has imposed no *substantive* (emphasis added) limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate.

463 U.S. at 1000, 103 S.Ct. at 3452-53, 77 L.Ed.2d at 1180.

The majority states that Article 36 "clearly delineates the general policy to prescribe pretrial, trial, and post-trial procedures for cases tried by courts-martial," and "clearly states that the authority is delegated to the President," and "does establish specific boundaries to limit the President's action under this provision" because the President "is bound to apply the principles of law recognized in criminal trials in the United States district courts." While I agree with that statement as far as it goes, the statement is flawed in that the United States district courts have no capital punishment principles to apply. Congress has not passed any federal legislation establishing *Furman*-type factors for federal capital offenses in general, but has for the specific crimes of aircraft piracy and espionage by military personnel; but in doing so, specified the aggravating factor(s) that had to be found before death could be imposed.

Although the United States district courts must follow the *Furman* mandate when interpreting capital punishment statutes,



as must we, the district courts—despite the validity or invalidity of any substantive-procedural distinctions—cannot establish the aggravating factors where none have been enacted by the Congress. *See United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984). Likewise, if a federal district court cannot effectuate an unconstitutional death penalty provision, neither can the President, pursuant to Article 36, which requires him to follow, insofar as practicable, the principles of law recognized in trials of criminal cases in United States district courts. Article 36, UCMJ.

Furthermore, Article 36's delegation is additionally limited by Article 56, UCMJ, for while giving authority to the President to prescribe maximum punishments, it does so in terms of non-capital offenses. That the President's authority to prescribe maximum punishments is limited to non-capital offenses is supported not only by the legislative history of Article 56 but in fact by the President's own past actions.[27] Since the inception of the UCMJ

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[27] I recognize that the Court of Military Appeals in *United States v. Flucas*, 23 U.S.C.M.A. 274, 275, 49 C.M.R. 449, 450 (1975), held that the President acted with proper authority when, pursuant to Article 36, UCMJ, he established the "element" of knowledge for the offense of assault, he provided "an aggravating factor increasing the maximum permissible punishment 'when the victim has a particular status or is performing a special function.' Paragraph 207b, MCM 1969." I can, however, distinguish *Flucas* on one simple ground—the death penalty is so unique that it requires different treatment. As Justice Stewart stated in his concurring opinion in *Furman*, 408 U.S. at 306, 92 S.Ct. at 2760, 33 L.Ed.2d at 388:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

*See* Dix, "Appellate Review of the Decision to Impose Death," 68 Geo.L.J. 97, 109 (1979).

Additionally, the punishment statute—Article 56—is clear on its face

and the promulgation of the first Manual for Courts-Martial, the provisions relating to the maximum punishments authorized for particular offenses—the Table of Maximum Punishments in MCM 1951 and 1969—have never addressed the punishments authorized for those offenses described in the various articles that authorize the imposition of the death penalty, even where life imprisonment is a mandatory lesser sentence. Therefore, since offenses carrying the death penalty are capital offenses, the President does not have the authority to prescribe anything which might effect the maximums with regard to Article 118, most particularly the aggravating factors that determine whether one convicted of a capital offense is eligible for consideration of imposition of the death penalty. If the President could prescribe the aggravating factors which make a person eligible for imposition of the death penalty, he would place a maximum on all other situations wherein a death occurs as the result of a criminal act for which Congress has authorized the death penalty. He would thus act contrary to congressional intent and his authority under Article 56. *See Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 1733, 77 L.Ed.2d 235 (1988); *United States v. United Verde*, 196 U.S. at 207, 25 S.Ct. at 222; *United States v. McCormick*, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960). While it is true that such an action accrues to the benefit of some capital offenders, without the proper authority or specific guidance of Congress, the President not only usurps authority but places other capital offenders in jeopardy when Congress may not have intended such unequal classification.[28]

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and it does not pertain to the death penalty. Thus, the principles of strict statutory construction apply. *United States v. Jenkins*, 7 U.S.C.M.A. 261, 262, 22 C.M.R. 51, 52 (1956).

[28] I also make no judgment on equal protection of the law questions such as that posed by appellant. I find it unnecessary to my resolution of this case.



A further indication that Congress and not the President is the proper authority for prescribing the aggravating factors, and a recognition by Congress of its responsibilities in this arena, is the 1986 enactment of Article 106a, 10 U.S.C. § 906a. Not only did Congress establish espionage as a capital offense, it also set forth within the statute itself, the aggravating factors that had to be found before imposition of the death penalty could be adjudged.[29] In that statute the Congress further delegated to the President the authority to prescribe other aggravating factors under Article 86.[30]

## VI.

## SUMMARY

In summary, I find that the Article 118 provision authorizing the imposition of the death penalty is unconstitutional and therefore invalid because of *Furman* and its progeny. I further find that the President's attempt in 1984 to effectuate that invalid authorization by promulgation of the aggravating factors set forth in R.C.M. 1004(c) pursuant to the authority vested in him by Articles 36 and 57, as they presently exist, was ineffectual because such delegation was constitutionally impermissible in the first place, or was an improper delegation by the Congress in the second.

Accordingly, while I approve the findings, I would disapprove the death penalty as approved on review below as a matter of law and approve only so much of the sentence as provides for dishonorable discharge, life imprisonment, forfeitures of all pay and allowances and reduction to pay grade E-1.

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[29] If Congress had tacitly approved or ratified R.C.M. 1004, as offered by the majority, why was it necessary for the Congress to set forth specific aggravating factors for Article 106a, UCMJ, a post-*Furman* statute?

[30] The propriety of that additional delegation is a matter for future resolution, if necessary.

**APPENDIX F**

U.S. COURT OF MILITARY APPEALS

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No. 63,044
NMCM 87-3856

UNITED STATES, APPELLEE

v.

RONNIE A. CURTIS, LANCE CORPORAL, U.S. MARINE CORPS, APPELLANT

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Argued Aug. 29, 1990
Decided April 18, 1991

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Accused, a lance corporal in the United States Marine Corps, was convicted by general court-martial, Sebastian Gaeta, Jr., J., of premeditated murder of two victims, burglary of their home, and various other offenses, and was sentenced to death. The United States Navy-Marine Corps Court of Military Review, 28 M.J. 1074, affirmed. On mandatory review the United States Court of Military Appeals, Everett, Senior Judge, held that: (1) capital case procedure promulgated by President through rule was not invalid as impermissible extension of presidential power and did not violate separation of powers, although President prescribed aggravating factors to be considered in making death penalty determination through the Manual for Courts-Martial; (2) rule promulgated by President to provide procedure for capital cases was not facially unconstitutional; and (3) before death sentence adjudged by court-martial can be approved, Court of Military Review must determine: whether one or more valid aggravating factors have been unanimously found by court-martial and that finding is factually and legally correct; if any corrective action results in setting aside any such finding, but leaves intact at least one aggravating factor, whether that error affected imposition of sentence; whether death sentence adjudged is disproportionate to other death sentences that have been imposed; and whether under all facts and circumstances of case death sentence is appropriate.



SULLIVAN, C.J., and COX, J., filed concurring statements.

For Appellant: *Robert E. Morin* and *Lieutenant Commander John B. Holt*, JAGC, USN (argued); *Captain Arthur R. Philpott*, JAGC, USN, *Lieutenant Commander L. Saccoccio*, JAGC, USNR-R; *Lieutenant Commander Susan K. Milliken*, JAGC, USN, *Captain Dwight H. Sullivan*, USMCR, *Lieutenant Frederic D. Firestone*, JAGC, USNR, *Lieutenant Thomas E. Miro*, JAGC, USNR (on briefs).

For Appellee: *Major Thomas D. Miller*, USMC, and *Lieutenant Commander Lawrence W. Muschamp*, JAGC, USN (argued); *Commander Thomas W. Osborne*, JAGC, USN and *Lieutenant Colonel Joseph S. Uberman*, USMC (on briefs); *Lieutenant Scott A. Hagen*, JAGC, USNR.

Amici Curiae on behalf of Appellant: *Captain Richard W. Aldrich*, (argued)—For Appellate Defense Division, USAF. *Ronald Meister* (argued); *Edward H. Shakin* (on brief)—For American Civil Liberties Union Foundation. *Captain Michael J. Berrigan* (argued); *Colonel Robert B. Kirby, Lieutenant Colonel Russell S. Estey, Captain Cynthia G. Wright* (on brief)—For Defense Appellate Division, U.S. Army. *Roger L. Stavis, Esq.* (argued); *Stephen J. Shapiro* and *Nicholas Kamillatos* (on brief)—For the Association of the Bar of the City of New York Committee on Military Affairs and Justice. *Jeanelle Mosley* (law student) (argued); *Ronald F. Wright* (on brief); *Michelle Davis*,

*Gaylyn Gee, Anne Shaw* (law students)—For Wake Forest University School of Law Clinical Appellate Program. *Steven H. Goldblatt* (on brief); *Kevin M. Hodges, Brian G. Holland, Juan Enrique Mejia* (law students)—For Georgetown University Law Center Appellate Litigation Program.

Amici Curiae on behalf of Appellee: *Captain David G. Nix* (argued), *Colonel Joe R. Lamport* and *Colonel Robert E. Giovagnoni* (on brief), *Major Paul H. Blackwell, Jr.*—For Appellate Government Division, USAF. *Captain Jonathan F. Potter* (argued); *Colonel Alfred F. Arquilla, Lieutenant Colonel Daniel J. Dell'Orto, Captain Randy V. Cargill, Captain Stephen R. Henley* (on briefs), For Government Appellate Division, U.S. Army *Paul J. Larkin, Jr.* (argued); *William P. Barr* and *Edward S.G. Dennis, Jr.*, Assistant Attorneys General; *Andrew G. McBride*, Associate Deputy Attorney General (on briefs)—For U.S. Department of Justice. *Paul D. Kamenar* (argued); *Daniel J. Popeo* (on brief)—For Washington Legal Foundation.

**OPINION OF THE COURT**

EVERETT, Senior Judge:

Appellant was sentenced to death by a general court-martial convened at Camp Lejeune, North Carolina. The issues now before us are whether the President was empowered to prescribe the procedure under which this sentence was adjudged and, if so, whether the rule he prescribed complied with constitutional requirements.

I

On April 14, 1987, Curtis used a pretext to obtain entry to the home of his supervisor, First Lieutenant James Lotz. His purpose—apparently the result of perceived racial slurs and the imbibing of gin—was to kill Lotz. He carried out his objective with a knife, and then he killed Lotz' wife, Joan.



After being apprehended, appellant was charged with the premeditated murder of both victims, the burglary of their home, and various other offenses.[1] The convening authority referred the charges to trial as a capital case; and pursuant to RCM 1004, Manual for Courts-Martial, United States, 1984, the Government notified[2] the defense of the "aggravating factors" on which it would rely.

After the general court-martial found Curtis guilty as charged, the Government offered evidence as to these "aggravating factors": (1) that Lieutenant Lotz' murder was aggravated by the murder of his wife; (2) that Mrs. Lotz' murder was aggravated by the murder of Lieutenant Lotz; and (3) that Mrs. Lotz' murder occurred during a burglary,[3] to wit: breaking and entering into the Lotz home at night with the intent to commit murder. The general court-martial adjudged the death sentence, which the convening authority approved. Thereafter, the Court of Mili-

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[1] These offenses included larceny of the knife he used to kill the Lotzes; larceny of their automobiles; and indecent assault on Mrs. Lotz after he had stabbed her. These offenses were in violation of Articles 118, 129, 121, and 134, Uniform Code of Military Justice, 10 USC §§ 918, 929, 921, and 934, respectively.

[2] At trial the defense questioned the validity of the notice because it only listed two "aggravating circumstances," namely: "a. the murder of Joan M. Lotz was committed while the accused was engaged in the commission of a burglary; and b. The accused . . . has been found guilty in the same case of another violation of Article 118." The defense objected to three factors being listed in the instructions and on the sentence worksheet when they were notified of only two. While the judge found the defense was not misled by the notice, it would be advisable for the notice to be precise as to what factors are being relied on for each specification which carries the death penalty.

[3] The Government relied on a "constructive breaking" by means of a pretext. *See* para. 55c(2), Manual for Courts Martial, United States, 1984. Curtis had come to the Lotz home at 2:00 a.m. and had pretended that another Marine had been in an accident. Lieutenant Lotz invited Curtis in while he phoned for assistance. While Lotz was phoning, appellant stabbed him

tary Review reviewed the case *en banc* and unanimously affirmed the findings of guilty. 28 MJ 1074 (1989). However, Chief Judge Byrne dissented from affirmance of the death sentence, which he concluded was not appropriate in this case (*id.* at 1095-96); and Judge Albertson dissented from affirmance of the sentence because she believed that RCM 1004 was unconstitutional. *Id.* at 1096-1113.

The case reached this Court for mandatory review. *See* Art. 67(a)(1), Uniform Code of Military Justice, 10 USC § 867(a)(1) (1989). After considering the briefs submitted by the parties, as well as various motions, we concluded that two issues—which were discussed extensively in the Court of Military Review, raised in this Court, and are common to any capital case tried by a court-martial—should be separately considered and argued. These issues were:

I

WHETHER THE CAPITAL PUNISHMENT PROCESS UNDER WHICH APPELLANT WAS SENTENCED TO DEATH IS INVALID BECAUSE IT IS AN IMPERMISSIBLE EXTENSION OF PRESIDENTIAL POWER.

II

WHETHER RULE FOR COURTS-MARTIAL 1004 IS UNCONSTITUTIONAL ON ITS FACE.

Thereafter, we received supplemental briefs from the parties and from various amici curiae and then heard extensive oral argument. Aided by the excellent briefs and argument, we now have concluded that the President acted within his powers in promulgating RCM 1004 and that this Rule otherwise satisfies constitutional requirements.



II

A

The Constitution, on its face, does not single out capital cases for special treatment. This point was made in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)—overruling *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), which had drawn a distinction between capital and noncapital cases. Likewise, in *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960), the Supreme Court rejected the attempt by Justices Frankfurter and Harlan to draw a line between capital and noncapital cases with respect to military jurisdiction over civilian defendants abroad.

The Supreme Court, however, has now made clear that the Eighth Amendment requires a different treatment of death-penalty cases. Thus, in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), a majority of the justices agreed that the arbitrary and capricious imposition of capital punishment—which, in their view, characterized most state procedures—violated the Eighth Amendment. *Cf. Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Likewise, in applying double jeopardy protections, a capital case is treated differently from other cases. *Cf. Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

We observe, also, that in practice, the issues raised by capital cases occupy a significant amount of the time spent by appellate courts. Thus, in its 1989 term, nine cases decided by the Supreme Court were capital.[4] The collateral attacks and multiple

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[4] *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255; *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316; *Butler v. McKeller,* 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347; *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369; *Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415; *Clemons v. Mississippi,* 494

reviews in capital cases have posed problems of judicial administration which have troubled Congress, the Supreme Court, the legal profession, and the public.

In regulating military justice, Congress has exhibited a special concern for capital cases. Most of the punitive articles of the Uniform Code of Military Justice provide that a convicted person "shall be punished as a court-martial may direct"; and only for a few crimes—such as wartime desertion, mutiny, sedition, espionage, murder, and rape—is a court-martial empowered to impose "death or such other punishment as a court-martial may direct." *See, e.g.*, Arts. 85(c), 94(b), 106a(a)(1), 118, and 120(a), UCMJ, 10 USC §§ 885(c), 894(b) 906a(a)(1), 918, and 920(a), respectively.[5] Article 45(b) of the Uniform Code, 10 USC § 845(b), prohibits a guilty plea in a capital case. Article 49(f), UCMJ, 10 USC § 849(f), limits use of depositions in capital cases. The third clause of Article 134, UCMJ, 10 USC § 934, incorporates the federal criminal code into military justice, but it only does so with respect to "crimes and offenses not capital."

**B**

In *United States v. Matthews*, 16 MJ 354 (CMA 1983), this Court considered the constitutionality of the sentencing procedure then prescribed for capital cases by the Manual for Courts-Martial. In some respects, this procedure met the requirements which we held had been established by *Furman v. Georgia, supra*, and succeeding Supreme Court cases—requirements which we concluded were applicable to courts-martial. For example, trials by courts-martial are bifurcated—the sentencing proceedings being separate from the adjudication of guilt. The accused has unlimited opportunity to present mitigating and extenuating evidence, which the military judge must identify to the court members for their deliberations on sentence. Moreover, mandatory review of the facts, the law, and the appropriateness of sentence is provided in death cases—as well as in most other cases tried by general court-martial.

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U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725; *Whitmore v. Arkansas*, — U.S. —, 110 S.Ct. 1717, 109 L.Ed.2d 135; *Walton v. Arizona*, — U.S. —, 110 S.Ct. 3047, 111 L.Ed.2d 511; *Lewis v. Jeffers*, — U.S. —, 110 S.Ct. 3092, 111 L.Ed.2d 606.

[5] For premeditated murder or felony murder, the punishment imposable under Article 118 is "death or imprisonment for life."



The principal defect that *Matthews* identified in the military justice system was that neither the Uniform Code of Military Justice nor the Manual for Courts-Martial required the court-martial members to "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty." 16 MJ at 379. Thus, upon appellate review, it was impossible to assure that a death penalty adjudged by a court-martial reflected "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Ibid.* quoting *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983).

In *Matthews*, we ruled that either Congress or the President could "take [corrective] action to remedy" the "defect that now exists in the sentencing procedure employed by courts-martial in capital cases." 16 MJ at 380. The majority of this Court concluded that, if new sentencing procedures were authorized, they could be applied retroactively for resentencing Matthews or other servicemembers as to whom death sentences had been adjudged. *Cf. Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Indeed, we ruled in *Matthews* that if the President or Congress prescribed constitutionally valid procedures for imposing the death penalty within 90 days after we issued our mandate, the new procedures could be used in resentencing the accused. 16 MJ at 382.

Within the 90-day period that had been allowed by this Court, President Reagan amended the Manual for Courts-Martial to provide a new procedure for capital cases. Exec. Order No. 12,460,

49 Fed.Reg. 3169 (1984). However, this amendment, by its own terms (§ 6), was prospective in application and was not intended to apply to Mathews or any other servicemember whose case had already been tried.

The death penalty procedure authorized by the President in January 1984 became RCM 1004 in the Manual for Courts-Martial, United States, 1984. When Congress amended the Uniform Code in 1985 by adding Article 106a—Espionage, and authorized the death penalty for this crime, RCM 1004 was amended to specify some additional "aggravating factors" for members of a court-martial to consider in deciding on a death penalty. § 1k(4), Exec. Order No. 12,550, 51 Fed.Reg. 6497, 6498 (1986).

We are now asked by appellant to reconsider our conclusion in *Matthews* that the President may constitutionally define the circumstances under which a death penalty may be imposed by a court-martial. Furthermore, appellant maintains that, in its present form, RCM 1004 is unconstitutional on its face.

## III

### A

RCM 1004, which is captioned "Capital cases," currently provides:

> (a) *In general.* Death may be adjudged only when:
>
> (1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and
>
> (2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and
>
> (3) The requirements of subsections (b) and (c) of this rule have been met.



> (b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—
>
> (1) *Notice.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.
>
> (2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.
>
> (3) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.
>
> (4) *Necessary findings.* Death may not be adjudged unless—
>
> (A) The members find that at least one of the aggravating factors under subsection (c) existed;
>
> (B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and;
>
> (C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.
>
> (5) *Basis for findings.* The findings in subsection

(b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) *Instructions.* In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) *Announcement.* If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of violation of Article 118 or 120;

(2) That in commiting the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;



(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) the murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sod-

omy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil.R.Evid. 315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United



States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing;

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense

advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) *Spying.* If the accused has been found guilty of spying under Article 106, subsections (a)(2)(b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) *Other penalties.* Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it.

(Discussion omitted.)

**B**

If "aggravating factors" used in channeling the discretion of the sentencing authority in death cases were elements of the crime, we would have no choice but to hold that they must be set forth by Congress and cannot be prescribed by the President. Consistent with Article I of the Constitution, only Congress has the power to legislate; and definition of the elements of a crime clearly is legislation. However, the Supreme Court has made clear that "aggravating factors" are not "elements" of a crime. *Cf. Walton v. Arizona*, 497 U.S. —, — 110 S.Ct. 3047, 3054-55, 111 L.Ed.2d 511, 525 (1990). For this reason a defendant has no right to a



jury trial as to the existence of aggravating factors, and the sentencer's rejection of a particular circumstance is not an "acquittal" of that circumstance for double jeopardy purposes. Cf. *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986).

Is it consistent, then, with the separation of powers required by the Constitution for the President to prescribe these "aggravating factors"? The recent decision of the United States Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), provides us with guidance.

There the Court considered the constitutionality of sentencing guidelines issued by the Sentencing Commission, which is chaired by a Federal circuit judge and has other judges among its members. The defendant complained that the commission and its guidelines were unconstitutional because promulgation of guidelines was a legislative task which should have been performed by Congress and because "the separation of powers doctrine" was violated by allowing active members of the judiciary to serve on the commission. However, the Supreme Court concluded, over Justice Scalia's vigorous dissent, that establishment of the commission had not violated separation-of-powers requirements and that the guidelines had been constitutionally promulgated.[6]

In *Mistretta*, the Court seemed willing to allow considerable flexibility and innovativeness in the allocation of power among governmental institutions. Apparently its chief concern was that one branch of Government not aggrandize itself at the expense of another. However, in *Mistretta* this fear was allayed because Congress had established the Sentencing Commission and had defined the task which it wished the Commission to perform. A year before the Court took a similar tack in upholding legislation

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[6] In footnote 11 of its opinion in *Mistretta*, the Supreme Court discussed the Sentencing Commission's authority with respect to the death penalty. 488 U.S. 361, 378, 109 S.Ct. 647, 657-58, 102 L.Ed.2d 714 (1989).

which provided for an Independent Counsel. *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

Unlike an Independent Counsel or members of the Sentencing Commission, the President holds an office specifically authorized by the Constitution. Moreover, he has been invested by the Constitution with the "executive Power," Art. II, § 1, and is the Commander-in-Chief of the Armed Forces. Art II, § 2. In view of his inherent constitutional authority, a separation-of-powers objection has much less merit in the present context than if the "aggravating factors" for capital cases tried by courts-martial had been formulated by a specially created commission.

We are mindful, however, of the separation-of-powers analysis in Justice Jackson's often cited concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). There, in dealing with the seizure of steel mills during the Korean War, Justice Jackson suggested that the President's power is the greatest when he acts under a specific delegation from Congress; is less when he acs without delegation, but as to a subject concerning which Congress has not legislated; and is the least when he acts on the basis of his inherent constitutional authority and against the express or implied wishes of Congress. *See* 343 U.S. at 635-38, 72 S.Ct. at 870-72. Presidential power to prescribe the "aggravating factors" in RCM 1004 is more sustainable if it has been expressly or implicitly conferred by Congress, or if Congress, at least, has displayed no desire to legislate in this field and a willingness to let the President take action.

It is clear that Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial. Most of the punitive articles in the Uniform Code provide that a convicted accused "shall be punished as a court-martial may direct." Under Article 56, UCMJ, 10 USC § 856, "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President



may prescribe for that offense." Article 18, UCMJ 10 USC § 818, states that a general court-martial "may, *under such limitations as the President may prescribe*, adjudge any punishment not forbidden by [the Code], including the penalty of death when specifically authorized by" the Code. (Emphasis added.) When these Articles are taken together, they reveal that—instead of legislating maximum punishments as it has done in Title 18 of the United States Code for cases tried in the District Courts—Congress has decided that the President shall set the maximum punishment imposable in trials by courts-martial.

Consistent with Articles 18 and 56 of the Code—and previously with comparable provisions of the Articles of War—the President for several decades prescribed maximum punishments in a Table of Maximum Punishments as part of the Manual for Courts-Martial. The current Manual sets the maximum punishments in subparagraph e for each paragraph in Part IV devoted to a particular offense.[7] In some instances, this Table and now the Manual text provide that a maximum punishment is increased because of aggravating circumstances. For example, driving while drunk carries a heavier penalty if it results in death. Para. 35e(1), Part IV, 1984 Manual, *supra*. Desertion terminated by apprehension authorizes a higher maximum punishment than desertion terminated by surrender. Para. 9e(2). The maximum punishment for larceny depends on the value of the property stolen. Para. 46e(1). And so on.

Thus, under a power delegated by Congress, the President has for many years been prescribing aggravating circumstances that would increase the punishment imposable for various offenses tried by courts-martial. Presumably, Congress has been well aware of his exercise of this power because, under Article 36(b) of the Uniform Code, 10 USC § 836(b), the rules and regulations pre-

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[7] Appendix 12 of the Manual lists maximum punishments, but it is not authoritative.

scribed by the President for courts-martial—including, of course, the maximum punishments—must be reported to Congress.

Since 1951 death penalties have been authorized by several punitive articles of the Uniform Code, and previously they had been permitted by the Articles of War and the Articles for the Government of the Navy. Furthermore, Congress has never displayed any intent to rescind them.

In 1983, when this Court decided *Matthews,* we held that either Congress or the President could prescribe "aggravating factors" for death cases in courts-martial. 16 MJ at 380-81. In view of our analysis in *Matthews,* it should have been apparent that, unless these aggravating factors were prescribed by one branch of government or the other, courts-martial would be precluded from adjudging death penalties.

When, after our *Matthews* decision the President prescribed a new sentencing procedure for death cases, his action was promulgated by Executive Order No. 12,460, *supra,* which gave notice to Congress and the public at large. We are unaware of any indication of legislative displeasure with the President's action or any legislative effort at that time to undo his action or to curtail the use of capital punishment in courts-martial.

In 1985, Congress enacted legislation which we interpret to be an affirmation of presidential power to prescribe "aggravating factors" for capital cases. The Uniform Code was amended by the addition of Article 106a, which prohibited espionage and authorized punishment "by death or such other punishment as a court-martial may direct." Art. 106a(a)(1). In connection with its death penalty, Article 106a provided:

> (b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—
>
> (A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and



> (B) the members unanimously determine that any extenuating or mitigating circumstances are substantially ouweighed by any aggravating circumstances, including the aggravating factors set out in subsection (c).
>
> (2) Findings under this subsection may be based on—
>
> (A) evidence introduced on the issue of guilt or innocence;
>
> (B) evidence introduced during the sentencing proceedings; or
>
> (C) all such evidence.
>
> (3) The accused shall be given broad latitude to present matters in extenuation and mitigation.
>
> (c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:
>
> (1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.
>
> (2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.
>
> (3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.
>
> (4) *Any other factor that may be prescribed by the President by regulations under section 836 of this title (article 36).*

Pub.L. No. 99-145, title V, § 534(a), 99 Stat. 634 (1985) (emphasis addded).

Two features of this legislation are noteworthy. First, the procedure prescribed by Article 106a conforms generally to the procedure which the President previously had prescribed in RCM 1004. Secondly, the President is specifically authorized by Article 106a(c)(4) to prescribe other "aggravating factors" in addition to the three that are set forth in Article 106a(c)(1)-(3). This authority is linked in (c)(4) of that Article to the power granted him by Article 36(a) of the Uniform Code to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof," for trials by courts-martial.[8]

In connection with the provision for death-penalty sentence proceedings in Article 106a, H.R. Conference Report No. 235, 99th Cong., 1st Sess., states:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provision of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards *that already exist for the other capital punishment articles.*

DOD Authorization Act of 1986, Pub.L. No. 99-145, 1985 U.S. Code Cong. & Admin. News, 571, 579 (emphasis added). If failure of Congress to complain about the content of regulations can be construed to be ratification, *cf. Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, AFL-CIO,* 367 U.S. 396, 408-09, 81 S.Ct. 1529, 1535-36, 6 L.Ed.2d 924 (1961), the provisions of Article 106a—

[8] Under Article 36(b), UCMJ, 10 USC § 836(b), the rules and regulations promulgated under Article 36(a) "shall be reported to Congress."



along with its legislative history—are even clearer evidence of ratification.

As heretofore mentioned, the Supreme Court has made clear its concern that one branch of government not grab any power which the Constitution has conferred on another branch. *Cf. Mistretta* and *Morrison,* both *supra; Bowsher v. Synar,* 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). By implication Article 106a affirms that Congress does not consider the President's prescribing "aggravating factors" to be in diminution of its own legislative power. Instead, Congress undoubtedly has concluded that, in view of the major role that for decades it has delegated to the President in prescribing limitations on maximum punishment, it is better for the President to prescribe "aggravating factors" by Executive Order than for Congress to attempt to do so by statute.[9]

### C

To the extent we rely on delegation from Congress as a source of presidential power, we are confronted by appellant's argument that Congress failed to prescribe standards for the exercise of the delegated power. *Cf. A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). Certainly Congress did not give the President guidance as explicit as that which the Sentencing Reform Act prescribed for the Sentencing Comission. Indeed, Justice Scalia, the sole dissenter in *Mistretta,* perceived no delegation problem

[9] Since we conclude that Congress has—at least, implicitly—delegated this task to the President, we need not consider what inherent authority the President would have in this area. For example, absent any indication of congressional willingness for him to prescribe "aggravating factors," could the President constitutionally do so? Also, what if Congress attempted to block exercise of this power by the President?

in the creation of that Commision and was concerned chiefly with the claimed violation of separation-of-powers principles.

However, in prescribing "aggravating factors" the President was not left totally without guidance from Congress. Article 106a(c)(4) refers to regulations prescribed by the President under Article 36—which, in turn, directs that the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be conrary to or inconsistent with" the Uniform Code. *See* Art. 36(a). Apparently Congress wished the President to look to the "principles of law" applied in federal criminal cases in determining what should be the "aggravating factors" for capital cases tried by court-martial. Furthermore, as we examine the "aggravating factors" prescribed by the President in RCM 1004, we find that they reflect policy expressed by Congress in various statutes—including several punitive articles of the Uniform Code of Miliary Justice—and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty.[10]

"Aggravating factor" (1) is commission of the offense "before or in the presence of the enemy." Article 99 of the Code, 10 USC § 899, authorizes death for nine types of misbehavior "before or in the presence of the enemy" and thereby it reflects a legislative judgment that such conduct is very harmful to the military mission.

"Aggravating factor" (2)(A) corresponds to an "aggravating factor" prescribed by Congress for espionage offenses, *see* Art. 106a(c)(2); and "Aggravating factors" (2)(B) and (3) also correlate wth the manifest congressional concern about espionage—a crime

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[10] *See Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2975, n.2, 2978 no.5, 106 L.Ed.2d 306 (1989), for a collection of federal and state statutes concerning the death penalty.



for which death is authorized by Article 106a(a)(1) of the Code. *See also* 18 USC § 794.

"Aggravating factor" (4) parallels an "aggravating factor" prescribed by Article 106a(c)(3) and reflects special concern if the crime for which the accused has been convicted created a grave risk of death to others. This "aggravating factor" has parallels in many state statutes authorizing the death penalty.[11]

"Aggravating factor" (5)—which involves commission of the offense "with the intent to avoid hazardous duty"—reflects legislative disapproval of flight from hazardous duty. Thus, desertion with intent to avoid hazardous duty authorizes the death penalty in time of war, *see* Art. 85(a)(2) and (c); and running away from the enemy or cowardly conduct also permits a death penalty, *see* Art. 99(1) or (5).

"Aggravating factor" (6)—which applies to murders and rapes in time of war—deals with conduct which violates the law of war; and thereby threatens international relations. The death penalty is not unusual for violations of the law of war; *see, e.g., In re Yamashita*, 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946)[12]; *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed.3 (1942); and perhaps the constitutional restrictions derived from *Furman* may not even apply to such violattions. *Cf. Yamashita* and *Quirin*.

"Aggravating factor" (7)—applies only to premeditated murder in violation of Article 118(1) and is the only "aggravating factor" involved in appellant's case. This "aggravating factor" has ten subparts. As explained in the Drafters' Analysis of this rule, *see*

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[11] *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 260 (1988); *Jones v. State*, 520 So.2d 543, 551-52 (Ala. 1988); *Stouffer v. State*, 738 P.2d 1349, 1361 (Okl.Cr. 1987); *Hogan v. State*, 103 Nev. 21, 732 P.2d 422, 424 (1987); *Way v. State*, 496 So.2d 126, 128 (Fla. 1986).

[12] Article 106, UCMJ, 10 USC § 906, which is based on the law of war, applies not only to servicemembers but also to civilians. Whether its mandatory death penalty is constitutional is open to question. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

Manual for Courts-Martial, United States, 1984, at A21-66 (Change 2), these "aggravating factors" were to a considerable extent derived from those contained in the state statutes enacted in response to *Furman v. Georgia, supra.*

Factor (7)(A) applies to an accused "serving a sentence of confinement for 30 years or more or for life at the time of the murder." This factor is intended to express disapproval of premeditated murder by an accused who has already been convicted of a very serious crime. Also, it may provide an additional deterrent for someone who might only be deterred by the death penalty.

Factor (7)(B) is that the premeditated murder occured "while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense."

Congress has severely condemned all of these crimes. Under Article 118(4), murder committed in the course of "burglary, sodomy, rape, robbery, or aggravated arson" permits a death sentence and requires at least life imprisonment. Mutiny and sedition are themselves capital offenses under Article 94. Piracy long has been viewed as a universal offense against the law of nations and is specifically mentioned in Article I, § 8, cl. 10 of the Constitution. Congress has prescribed the death penalty for skyjacking under certain circumstances—49 USC App § 1472(i)(l)(B) (aircraft piracy resulting in death authorizes the death penalty).[13] Kidnapping also is severely condemned by the Federal criminal code, 18 USC § 1201(a)—although the death penalty, which at one time Congress authorized for this crime,

[13] Whether the authorized penalty of death if the death of another person occurs as a result of the air piracy is constitutionally sustainable may be questioned since the statute requires no specific findings of aggravation and specifies no aggravating factors.



was subsequently held unconstitutional in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

Factors (7)(C), (7)(D), and (7)(E)—which involve, respectively, murder "for the purpose of receiving" something of value, "procur[ing] another . . . to commit the murder," or committing the murder "to avoid or to prevent lawful apprehension or effect an escape"—have counterparts in many state statutes. *See, e.g., Ariz. Rev. Stat. Ann.* 13-703(F)(5) (Supp. 1988) (which includes as a factor that the homicide was committed with the expectation of receiving something of value); *see also Walton v. Arizona*, — U.S. —, 110 S.Ct. 3047, 3051, 111 L.Ed.2d 511 (1990). Of course, resistance of apprehension and escape are offenses under the Uniform Code. *See* Art. 95, 10 USC § 895.

"Aggravating factor" (7)(F)—concerns the official status or duties of the victim, and it corresponds with recent legislation seeking to protect various public officials. *See, e.g.* 18 USC §§ 351 and 1751.

Factor (7)(G) centers on the victim's execution of his military office or his duties, military or civilian, in law enforcement, security, or firefighting. At least to some extent, this "aggravating factor" recognizes a congressional intent to protect persons performing duties important to public safety. *Cf.* 18 USC § 1114; Arts. 90 and 91, UCMJ, 10 USC §§ 890 and 891, respectively.

"Aggravating factor" (7)(H) concerns "intent to obstruct justice." Obstruction of justice is a recognized federal crime. 18 USC §§ 1501-15. In military practice obstruction or interference with the administration of justice is not limited to those acts enumerated in the federal criminal code—*United States v. Jones*, 20 MJ 38, 40 (CMA 1985); *United States v. Long*, 2 USCMA 60, 6 CMR 60 (1952); but under the facts here we need not decide which definition should be applied to the act alleged to have aggravated the offense.

"Aggravating factor" (7)(I) resembles an "aggravating factor" in many state statutes for murders described as "heinous, atrocious, or cruel" or in similar terms. However, unlike the state statutes—which have sometimes been successfully attacked as vague—*see Maynard*

*v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and have required limiting judicial construction, *cf. Walton v. Arizona*, *supra*—this "aggravating factor" is stated clearly in RCM 1004.

"Aggravating factor" (7)(J) is "another violation of Article 118"—*i.e.*, another murder—"in the same case." Since any violation of Article 118 has a maximum punishment either of death or of life imprisonment this "aggravating factor" is predicated on conduct viewed quite seriously by Congress. Likewise, in many state statutes, a second murder is an "aggravating factor."[14]

"Aggravating factor" (8) applies only in the case of a violation of Article 118(4), and so relates only to felony murders. We have held that an accused may be convicted of murder under Article 118(4) even though he did not kill the victim and only aided and abetted commission of the felony on which the felony-murder conviction was based. *United States v. Jefferson*, 22 MJ 315 (CMA 1986). The Supreme Court has concluded that the Eighth Amendment is violated when a defendant is sentenced to death for a felony murder if he did not participate actively in the killing. *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *but cf. Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (upholding a death penalty foor an accused who did not kill the victim, but whose conduct was related to the killing).

"Aggravating factor" (9) applies only to a violation of Article 120—which authorizes a death penalty for rape. In *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court held that executing a defendant for rape of an adult female would violate the Eighth Amendment. We intimated

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[14] *See Townsend v. State*, 533 N.Ed.2d 1215, 1229 (Ind. 1989); *Wallace v. State*, 486 N.Ed.2d 445, 463 (Ind. 1985); *Hightower v. State*, 259 Ga. 770, 386 S.Ed.2d 509, 511 (1989); *State v. Sloan*, 756 S.W.2d 503, 509, 511 (Mo. banc 1988).



in *Matthews* that this same principle would apply to trials by courts-martial, "at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense." 16 MJ at 380.

This "factor" seeks to comply with *Coker* by permiting the death penaly only if "[t]he victim was under the age of 12" or if "[t]he accused maimed or attempted to kill the victim." Congress has manifested its intent that young females be protected from sexual intercourse by creating the offense of carnal knowledge, whereunder a servicemember may be punished for consensual intercourse with a female under 16. Also, Congress has prohibited both maiming, *see* Art. 124, UCMJ, 10 USC § 924, and attempted murder, *see* Art. 80, UCMJ, 10 USC § 880, and Art. 118.

"Aggravating factor" (10) applies to conduct for which "death is authorized under the law of war." The law of war—which is part of the "Law of Nations" within the meaning of Article I, § 8, cl. 10 of the Constitution—provides a separate basis of military jurisdiction from that which exists under Article I, § 8, cl. 14, on which the Uniform Code is based. *In re Yamashita* and *Ex Parte Quirin*, both *supra*. Violations of the law of war may be tried by general court-martial, *see* Art. 18, or by a military commission or some other type of military tribunal. *Cf.* Arts. 104 and 106, UCMJ 10 USC § 904 and 906, respectively; *In re Yamashita* and *Ex Parte Qirin*, both *supra; Madsden v. Kinsella*, 343 U.S. 341, 72 S.Ct. 699, 96 L.Ed. 988 (1952). If the line of decisions beginning with *Furman v. Georgia*, *supra*, applies to violations of the law of war and if an aggravating factor must be established to permit imposition of the death penalty for those violations, it seems appropriate that one "aggravating factor" should be that the law of war recognizes the seriousness of the conduct involved by authorizing the punishment of death.[15]

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[15] Article 18, UCMJ, 10 USC § 818, authorizes either general courts-martial or other military tribunals to administer the law of war.

"Aggravating factor" (11) applies only to violations of Article 104—aiding the enemy—or of Article 106a—espionage. The first alternative is that "[t]he accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute." Here again, aggravation is found in conduct which Congress has condemned by authorizing punishment of death or life imprisonment.

The other alternative is based on the language of Article 106a(c)(3), whereunder an aggravating factor for the offense of espionage is that "the accused knowingly created a grave risk of death to another person."[16]

From our examination of the "aggravating factors" formulated by the President in RCM 1004, it seems clear that, to a considerable extent the President acted in reliance on legislative policy expressed in the Uniform Code of Military Justice and in other federal statutes. This is especially true with respect to "aggravating factor" (7) and its various subparts—which were utilized in adjudging the death penalty in the present case. To the extent the President went outside federal statutes for guidance, he drew upon the Model Penal Code—which has been a source of decisional guidance in military justice, *see, e.g., United States v. Byrd*, 24 MJ 286 (CMA 1987); *United States v. Frederick*, 3 MJ 230 (CMA 1977); *United States v. Thomas*, 13 USCMA 278, 32 CMR 278 (1962)—and upon patterns discerned in state death-penalty legislation.

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[16] Indeed, the language used in the Rule, which adverts to "grave risk of death to a person other than the individual who was the victim," seems to suggest that, in order for this aggravating factor to apply, the accused not only must have been convicted of aiding the enemy or espionage, but also must have killed one person "who was the victim" and placed in great danger someone else. We doubt that this additional restriction was intended. Nevertheless, since, in describing this "aggravating factor," the President did not use the language, "the victim, if any"—as he did for "aggravating factor" (4)—"aggravating factor" (11)(B) must contemplate a "victim" apart from the person placed at risk.



We note also that RCM 1004 is more specific in prescribing aggravating factors than is true of many state statutes. It does not use terms like "heinous," "vile," "atrocious," and "cruel"—which present issues of vagueness and necessitate extensive judicial construction. *See, e.g., Walton v. Arizona, Maynard v. Cartwright,* and *Godfrey v. Georgia,* all *supra.* Thus, the "aggravating factors" under RCM 1004 are easier to apply than some civilian counerparts.

As has already been emphasized, the "aggravating factors" which President Reagan prescribed in January 1984 and which were incorporated in Manual for Courts-Martial, United States, 1984, were known to Congress. In enacting Article 106a in 1985, Congress specifically authorized the President to prescribe "aggravating factors" for espionage prosections in addiiton to those prescribed by Congress. Art. 106a(c)(4). We interpret this express congressional delegation to signify approval of the standards which the President theretofore had employed in prescribing "aggravating factors" for use in capital cases. RCM 1004(c).

Although the guidance provided by Congress to the President was not so specific as that which Congress gave to the Sentencing Commission, *see Mistretta v. United States, supra,* the President was not set adrift in an uncharted sea. Instead, in prescribing "aggravating factors," he was guided by the Uniform Code and other federal legislation and by a pattern of legislative intent discernible in the state statutes. Moreover, Congress not only acquiesced in his performance of this task but also tacitly ratified the "aggravating factors" when it enacted Article 106a of the Uniform Code.

## IV

Appellant has vigorously attacked the constitutionality of RCM 1004, as promulgated by the President. He claims that the Rule should require the court-martial to have at least 12 members at all times.[17] Appellant recognizes that courts-martial are not subject to

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[17] In appellant's case, there were originally 15 members of the court-martial, but after challenges, the number was reduced to 9.

the jury-trial requirements of the Sixth Amendment, *see Ex parte Quirin*, 317 U.S. at 39-45, 63 S.Ct. at 16-19; but he reasons that to allow a death penalty to be imposed by less than 12 members violates the Eighth Amendment. His premise is that, even though juries in state courts are not required constitutionally to have 12 members, *see William v. Florida*, 399 U.S. 78, 98 S.Ct. 1893, 26 L.Ed.2d 446 (1970), those states in which juries do participate in imposing the death penalty use 12-member juries for this task. Moreover, the Supreme Court has recognized that the number of jurors is related somewhat to the reliability of their decision, and therefore no state jury may be reduced below 6 in number without violating due process. *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978). Appellant claims that, if there are at least 12 court-martial members, there will be an input of diverse viewpoints, so that any decision on imposing capital punishment is less likely to be arbitrary or capricious.

The defense concedes that a civilian judge alone may be entrusted with imposing the death sentence, *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Walton v. Arizona*, *supra*; and he may even be empowered to override a jury recommendation for life imprisonment. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). However, appellant points out that a judge has a professional background which qualifies him for his sentencing task, while court-martial members lack similar experience.

Under RCM 1004, the court-martial members—who have been chosen pursuant to the criteria set forth in Article 25 of the Code, 10 USC § 825-must be unanimous in finding aggravating factors.[18] The military judge can, at least, recommend a commutation of a death

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[18] Unanimity is not always required by state law. *See Jackson v. State*, 530 So.2d 269, 271 (Fla. 1988)—the vote to recommend the death penalty was 7-5; *Parker v. State*, 476 So.2d 134 (Fla. 1985)—the vote was 8-4.



sentence adjudged;[19] and the convening authority is empowered to commute the sentence. Furthermore, a Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence. In view of all these safeguards, we are not convinced that a court-martial must have 12 members in a capital case when this is not required in any other type of trial.

Under RCM 1004, the members must unanimously find at least one of the listed aggravating factors. Unlike the procedure under some state statutes upheld by the Supreme Court, *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), there is no "aggravating factor" which *compels* the sentencing authority to impose the death sentence.[20] Instead, all the court-martial members must "concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances . . . including the factors under" RCM 1004(c). RCM 1004(b((4)(C).

The defense seems to complain that RCM 1004 does not prescribe any mitigating factors to be found by the members of the court-martial. However, by omitting provision for such findings, the rule avoids the problem posed in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and in *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). There the instructions of the trial judge were construed by the Supreme Court to mean that a mitigating factor could not be considered at all unless all the jurors concurred in finding that it existed. Thus, such an instruction might enable a juror who wanted the death penalty imposed to hold out against any findings that mitigating fac-

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[19] We need not decide now whether the military judge is himself empowered to set aside a death sentence that he considers disproportionate or otherwise defective.

[20] If the President had attempted to require that a death sentence be adjudged if an "aggravating fractor" were found, we believe he would clearly have exceeded his constitutional authority.

tors existed. Instead, RCM 1004 allows an accused broad leeway to bring to the attention of the court-martial members any information which he believes would mitigate his sentence. *Cf. Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 A(1989); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Appellant has contended that RCM 1004 is defective because it lacks any provision to prevent racial bias—like that included in a recently enacted federal anti-drug statute. Section 848(*o*) of Title 21, USC, requires that, in a drug case where the death penalty is authorized, the jury be instructed not to "consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim." This statute did not become effective until after appellant's trial (102 Stat. 4545) and, by its own terms, applies only to jury trials in federal district courts. Its requirements—however desirable they may be[21]—are not constitutionally mandated; otherwise, the Supreme Court would have applied them to capital cases tried by state courts.[22]

Appellant contends that court-martial members would be misled by the sentencing procedure, because they must find "any aggravating factors" but they do not make findings as to "mitigating factors." His assumption is that, if one or more "aggravating factors" are found and no "mitigating factors" are specifically found, the members will inevitably conclude that the "aggravating factors" substantially outweigh the "mitigating factors." Under this view, the President's attempt to allow the members the maximum leeway to consider mitigating evidence—in compliance with the principles announced in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct.

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[21] The military judge could give such instruction *sua sponte* or if requested by the defense. Such an instruction certainly seems desirable.

[22] Curtis, who is black, was tried by a panel which included several blacks. Despite his claim that he had killed Lieutenant Lotz in a rage provoked by the victim's racial prejudice, the members voted unanimously for the death penalty.



2978, 49 L.Ed.2d 944 (1976), and *Lockett v. Ohio, supra*—is deemed to be a vice rather than a virtue. While there might be some advanages in the procedure urged by the defense for finding mitigating factors, there also can be disadvantages—as evidenced by *McKoy v. North Carolina* and *Mills v. Maryland*, both *supra*. We believe that the President made a constitutionally permissible choice.

The defense insists that RCM 1004 should require a separate finding by the members that "any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." We are convinced, however, that the weighing of aggravating against mitigating factors can be adequately handled by instructions to the members that they must all concur as to this imbalance and does not require a separate finding. *United States v. Evans*, 27 MJ 34, 40 (CMA 1988), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 797, 102 L.Ed.2d 788 (1989). Such instructions were given here.

In sum, as we construe RCM 1004, it not only complies with due process requirements but also probably goes further than most state statutes in providing safeguards for the accused.

## V

This case provides an example of matters that must be considered during appellate review before a death sentence can be approved. Here, one of thhe "aggravating factors" found by the court-martial was that Mrs. Lotz had been killed by appellant in the preparation of a burglary. However, two other "aggravating factors" were submitted to the members. Specifically, the members found:

> PRES: Lance Corporal Ronnie A. Curtis, United States Marine Corps, this court-martial finds that the following aggravating factors have been proven beyond a reasonable doubt:
>
> That with regard to the premeditated murder of Mrs. Joan M. Lotz, the premeditated murder of her was com-

mitted while the accused, Lance Corporal Ronnie A. Curtis, U.S. Marine Corps, was engaged in the commission of a burglary;

That with regard to the premeditated murder of Mrs. Joan M. Lotz, that the accused, Lance Corporal Ronnie A. Curtis, has been found guilty in the same case of another murder, to wit: That of Lieutenant James F. Lotz, United States Marine Corps Reserve, in violation of Article 118, Uniform Code of Military Justice, and

That with regard to the premeditated murder of Lieutenant James F. Lotz, U.S. Marine Corps Reserve, the accused, Lance Corporal Ronnie A. Curtis, U.S. Marine Corps, has been found guilty in the same case of another murder, to wit: that of Mrs. Joan M. Lotz, in violation of Article 118, Uniform Code of Military Justice.

Either of these latter two "factors" meet the criteria of RCM 1004(c)(7)(J): "The accused has been found guilty in the *same case* of another violation of Article 118; . . ." (Emphasis added.) There is some authority to the effect that the separate findings as to these two "factors" might represent a double counting of "aggravating factors"; and, hence, one of the findings might need to be vacated. *People v. Harris*, 36 Cal.3d 36, 201 Cal.Rptr. 782, 801, 679 P.2d 433, 452 (1984), *cert. denied*, 469 U.S. 965, 105 S.Ct. 365, 83 L.Ed.2d 301 (1984); *Wilson v. State*, 300 S.E.2d 640, 648, (Ga.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983); *State v. Goodman*, 257 S.E.2d 569 (NC 1979). We leave open this issue for consideration during further proceedings in this case. However, we observe that setting aside one "aggravating factor" where others remain does not mandate vacating the death sentence. *Clemons v. Mississippi*, *supra*. If it is decided hereafter that only two—rather than three—"aggravating factors" should have been found by the court-martial, then it will be necessary for the Court of Military Review to determine whether the death sentence would have been adjudged at trial if only two "factors" had been found. *Cf. United States v. Sales*, 22 MJ 305 (CMA 1986); *United States v. Suzuki*, 20 MJ 248 (CMA 1985).



Article 66(c) UCMJ, 10 USC § 866(c), provides that, "[i]n a case referred to it, the Court of Military Review . . . may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, *as it finds corect in law and fact* and determines, *on the basis of the entire record*, should be approved." (Emphasis added.) This extensive appellate review, which includes review of appropriateness of sentence, seems unique to military justice. However, many states provide for review of death sentences—usually refered to as a "proportionality review." *See, e.g., Gregg v. Georgia, supra*, 428 U.S. 153, 96 S.Ct. 2909.

This review is not constitutionally required in civilian cases where the statutory procedures adequately direct the sentencing authority's exercise of discretion. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 306, 107 S.Ct.1756, 1774, 95 L.Ed.2d 262, 288 (1987); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In view of the safeguards prescribed by RCM 1004, we are convinced that a "proportionality review" is not required by the Eighth Amendment, which prohibits "cruel and unusual punishments," or by Article 55, 10 USC § 855, which prohibits "cruel or unusual punishment." However, we conclude that such a review is encompassed within the responsibility for determining appropriateness of sentence under Article 66 of the Code. Likewise, in the unique context of the death penalty, we believe that Congress intended for our Court to oversee this review in order to assure that it is properly performed.

In *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637, 650 (1983), the Supreme Court stated:

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

With this guidance in mind, we conclude that proportionality review *need not* be limited to death sentences from the accused's own Service or even to death sentences imposed by courts-martial.[23]

Accordingly, before a death senence adjudged by a court-martial can be approved, the Court of Military Review must determine: (a) whether one or more valid aggravating factors have been unanimously found by the court-martial and this finding is factually and legally correct; (b) if any corrective action results in setting aside any such finding but leaves intact at least one "aggravating factor," whether this error affected imposition of the sentence; (c) whether the death sentence adjudged is proportionate to other death sentences that have been imposed; and (d) whether under all of the facts and circumstances of the case the death sentence is appropriate, Art. 66(c).

---

[23] An interesting South Carolina case deals with a proportionality review of a death sentence where there had been no prior death sentences in that jurisdiction that could be used for comparison. *See State v. Shaw*, 273 S.C. 194, 255 S.Ed.2d 799, 807 (1979):

> We have compared the death sentences imposed upon appellants with the sentences imposed in all prior capital cases tried under the current death penalty states and are satisfied that there are no similar cases aginst which the proportionality of the sentences imposed upon appellants can be measured.
>
> The inability of this Court to compare this case with any other similar cases does not require, however, that appellants' sentences be set aside. Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases. The first case must stand alone, otherwise comparative sentence review would be forever impossible.

(Footnote omitted.)

This was the first capital punishment case reviewed in South Carolina under death penalty statutes revised after *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).



## VI

We shall set this case for further argument to dispose of the remaining questions which have been raised by the defense. After deciding them, we shall issue our mandate.

SULLIVAN, Chief Judge (concurring):

I concur with the scholarly and excellent opinion of Senior Judge Everett concerning the constitutionality of RCM 1004, Manual for Courts-Martial, United States, 1984. However, I reserve judgment on the effect of Article 66, Uniform Code of Military Justice, 10 USC § 866, on this case since such a holding is not required to answer the specified issues decided today.

It is my personal view, however, that, in peacetime, a servicemember in a capital case should be tried by a 12-member court-martial. The value of a soldier's life is surely equal to the value of the life of his fellow citizens. *Cf. Williams v. Florida*, 399 U.S. 78, 103, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970). Nevertheless, neither the Constitution itself, nor Congress in legislation, nor the President by regulation has mandated a 12-member panel in a military capital case. *See generally* Van Loan, *The Jury, The Court-martial, and The Constitution*, 57 Cornell L. Rev. 363, 384 n.118 (1972). Moreover, it is the duty of this Court to apply the law of the land, not to legislate by judicial fiat, and therefore, it is beyond our power to mandate such a procedure. Finally, appellant himself, by use of his challenges, reduced in part the number of court members detailed to this case from 15 to 9. Moreover, he did not particularly object to trial by 9 members at this court-martial or request the detail of additional members. I could not find reversible error in these circumstances even if appellant was somehow entitled to a 12-member panel.

COX, Judge (concurring):

I concur with the resolution of the specified issues before us. I write only to reserve judgment on some other matters discussed by Senior Judge Everett which are used to illustrate the rationale of his decision.

Supreme Court, U.S.
FILED
SEP 1 1995

No. 94-1966

# In the Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the President had the authority to promulgate Rule for Courts-Martial 1004.

2. Whether a defendant may be sentenced to death by a court-martial panel of fewer than twelve persons.

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-227a) is reported at 41 M.J. 213. The initial opinion of the United States Army Court of Military Review, now the United States Army Court of Criminal Appeals (Pet. App. 229a-256a), is reported at 34 M.J. 956, and its opinion denying reconsideration (Pet. App. 257a-265a) is reported at 34 M.J. 1065.

### JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on Novem-

ber 10, 1994. A petition for reconsideration was denied on February 2, 1995. Pet. App. 228a. On April 21, 1995, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including June 2, 1995, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1).

## STATEMENT

Petitioner was convicted by a general court-martial of premeditated murder, felony murder, attempted murder, and robbery (four specifications), in violation of Articles 118, 80, and 122, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 880, and 922. The court sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances. The United States Army Court of Military Review affirmed. 34 M.J. 956, reconsideration denied, 34 M.J. 1065 (A.C.M.R. 1992) (Pet. App. 229a-265a). The United States Court Appeals for the Armed Forces affirmed. Pet. App. 1a-227a.

1. In *United States* v. *Matthews*, 16 M.J. 354 (C.M.A. 1983), the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) analyzed the constitutionality of the military's death penalty provisions, Article 118, UCMJ, 10 U.S.C. 918. After reviewing this Court's cases, the court concluded that certain common features appeared in a constitutionally valid death penalty procedure: a bifurcated sentencing proceeding; specific aggravating circumstances; selection of and findings on the particular aggravating circumstances used by the sentencer to impose the death penalty; unrestricted opportunity for the defendant to present mitigation and extenuation evidence; and mandatory



appellate review of the appropriateness of the sentence. *Id.* at 377.

The *Matthews* court found all of those safeguards present in the military system except for specific aggravating factors.[1] The court held that because court-martial members were not required to identify specifically the aggravating factors relied upon in assessing the death sentence, it was impossible for appellate courts to determine whether the members had made an individualized sentencing determination based on the character of the defendant and the circumstances of the crime. 16 M.J. at 379. The court indicated that either Congress or the President, in his capacity as Commander in Chief and/or pursuant to the powers that Congress delegated to him, could take corrective action. *Id.* at 380 (citing Art. 36, UCMJ, 10 U.S.C. 836).

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[1] The court noted (1) that the military follows a bifurcated sentencing procedure; (2) that "[c]ertain aggravating circumstances, such as premeditation, specific intent, and murder during commission of specified felonies, must be found by the court members * * *. These findings identify the instances in which an accused is eligible for the death penalty. After the findings, evidence may be submitted to identify other aggravating circumstances." 16 M.J. at 378 (citation omitted); (3) that the defendant has an unlimited opportunity to put on evidence in extenuation and mitigation; (4) that there is mandatory review of the facts, law, and sentence appropriateness followed by a mandatory review of the law by the Court of Military Appeals (now the Court of Appeals for the Armed Forces); and (5) that the President, who can take any lesser action on the sentence, must ultimately approve any death sentence. *Ibid.* See generally A. Sullivan, *The President's Power to Promulgate Death Penalty Standards*, 125 Mil. L. Rev. 143 (1989).

The President responded by promulgating Rule for Courts-Martial (RCM) 1004, see Pet. App. 354a-360a (reproducing RCM 1004), which amended the Manual for Courts-Martial to provide procedures for adjudicating cases in which the death penalty is authorized for homicide by Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. See *Manual for Courts-Martial, United States, 1984* (*Manual*). RCM 1004, which had been circulated for public comment before the decision in *Matthews*, rectified the deficiency identified in that opinion by enumerating specific aggravating factors, at least one of which the court-martial members must unanimously find in order to impose the death penalty. RCM 1004 also provides that all members of the court-martial must concur that the aggravating circumstance(s) substantially outweigh any extenuating or mitigating circumstances before death can be adjudged. The President caused the 1984 Manual for Courts-Martial and its Rules for Courts-Martial to be issued by "virtue of the authority invested in [him] as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code [*i.e.*, the UCMJ]." Exec. Order No. 12,473, 3 C.F.R. 201 (1984 comp.).

2. During the evening of December 11, 1988, petitioner, an Army private stationed at Fort Hood, Texas, robbed at gun point two different 7-Eleven convenience stores in Killeen, Texas. Pet. App. 3a, 231a; Pet. 4-5. In the first robbery, petitioner fired two shots into the counter and soda fountain, which were behind the cashier; he obtained $38. In the second robbery, petitioner fired a bullet into the cash register, and demanded that the cashier put money in



a paper bag. As he ran out, petitioner fired a round back into the store. He obtained approximately $52 from the second robbery *Id.* at 3a, 231a.

When the 7-Eleven robberies netted him only a small amount of cash, petitioner conceived a plan to rob taxicab drivers. On the evening of December 12, 1988, petitioner called a taxicab to take him from a store in Killeen to his barracks in Fort Hood. The driver of the taxicab was an active-duty soldier, Christopher Fay, who was working for extra money. Petitioner directed Fay to a secluded area on Fort Hood, where he demanded Fay's money at gun point. After receiving some money from Fay, petitioner shot him in the back of the head. While looking at the bleeding wound, petitioner cocked his pistol and again shot Fay in the back of the head. Fay died. Pet. App. 3a-4a, 231a-232a.

Petitioner fled to his barracks and, after counting the money he obtained from Fay, called a second taxicab. That cab was driven by a retired Army sergeant, Bobby Sharbino. Petitioner directed Sharbino to a secluded street in Killeen, where he robbed Sharbino of his money pouch, wallet, and other personal effects. Petitioner then ordered Sharbino to lie down on a car seat and shot him in the head, killing him. Pet. App. 4a, 232a.

Later that evening, petitioner took his girlfriend to a nightclub in Killeen. Upon leaving, petitioner and his girlfriend entered a taxicab driven by Howard Harrison. After dropping his girlfriend off near her residence, petitioner directed Harrison to a secluded area and robbed him at gun point. Petitioner then attempted to kill Harrison. Harrison struggled with

petitioner, disarmed him, and fled. Pet. App. 4a-5a, 232a-233a.

Acting on leads provided by Harrison, law enforcement agents, including agents of the Army Criminal Investigation Command (CID), arrested petitioner in the afternoon of December 13, 1988. Petitioner was taken to the CID office, where, after being advised of his rights, he made a full videotaped confession describing his crimes in detail. Searches of the area surrounding petitioner's girlfriend's residence, and of the residence and other places frequented by petitioner, resulted in the recovery of the weapon used in the murders and robberies, spent and unspent bullets, petitioner's blood-stained jacket, and effects taken from the murder victims. Pet. App. 232a n.2, 233a, 5a, 7a. Later, while incarcerated at the U.S. Army facility at Fort Riley, Kansas, petitioner told a fellow inmate that he had committed the first murder "to see if he could get away with it," and the second murder "because it was fun," and that "if he had to do it over, the only difference is he wouldn't get caught." *Id.* at 68a-69a.

An eight-member court-martial unanimously found petitioner guilty of the premeditated murder of Sharbino and of the felony murder of Fay. By a non-unanimous vote, the court-martial also found petitioner guilty of attempting to murder Harrison, of robbing Sharbino and Harrison, and of robbing the 7-Eleven stores. Pet. App. 8a-9a.[2] After a hearing

[2] In addition, petitioner was found guilty of the premeditated murder of Fay, the robbery of Fay, and the felony murder of Sharbino. After the findings were announced, the military judge dismissed those specifications as multiplicitous. Pet. App. 9a.



conducted in accordance with RCM 1004, the court-martial unanimously found, as aggravating factors, that the premeditated murder of Sharbino was committed while petitioner was engaged in a robbery (see RCM 1004(c)(7)), that in the felony murder of Fay petitioner acted as the triggerman (see RCM 1004(c)(8)), and that petitioner, having been found guilty of the premeditated murder of Sharbino, was found guilty of another murder in the same case (see RCM 1004(c)(7)(J)). Pet. App. 253a-254a. The court-martial unanimously sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances. The convening authority approved the findings and sentence. Pet. App. 9a, 230a.[3]

3. The Army Court of Military Review affirmed the findings and sentence. Pet. App. 229a-256a. In accordance with Article 66, UCMJ, 10 U.S.C. 866, the court independently weighed the evidence and "agree[d] with each of the aggravating factors found by the court-martial." Pet. App. 254a. The court also found "that any extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances." *Ibid.*

On appeal, petitioner argued that Article 118, UCMJ, 10 U.S.C. 918, is unconstitutional under *Furman* v. *Georgia*, 408 U.S. 238 (1972), in that it does not sufficiently narrow the class of death-eligible defendants, and that the President exceeded his authority under the Constitution and the UCMJ

[3] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members, directs that the accused be tried by the court-martial for the charged offenses, and conducts a post-trial review of the proceedings.

in promulgating RCM 1004 to provide specific aggravating factors. The court found those claims foreclosed by *United States* v. *Curtis*, 32 M.J. 252 (C.M.A.), cert. denied, 112 S. Ct. 406 (1991). Pet. App. 230a. In that case, the Court of Military Appeals had upheld RCM 1004 against similar attacks. See Pet. App. 346a-384a (reproducing *Curtis* opinion).

The *Curtis* court concluded that under the Uniform Code of Military Justice, the President has long "play[ed] the major role in determining what punishments may be imposed by courts-martial." Pet. App. 362a-363a. It held that several provisions of the UCMJ, particularly Articles 18, 36, and 56, UCMJ, 10 U.S.C. 818, 836, and 856, authorized the President to promulgate aggravating factors for capital cases. Relying on *Mistretta* v. *United States*, 488 U.S. 361 (1989), the *Curtis* court rejected a separation-of-powers challenge to that delegation, noting that "[i]n view of [the President's] inherent constitutional authority [as Commander-in-Chief of the Armed Forces], a separation-of-powers objection has much less merit in the present context than if the 'aggravating factors' for capital cases tried by courts-martial had been formulated by a specially created commission." Pet. App. 361a-362a. *Curtis* also rejected the contention that Congress failed to give the President an intelligible principle for the exercise of the delegated powers, explaining that the UCMJ's direction in Article 36 that the President apply "the principles of law" that are generally applied in federal district courts constitutes an adequate standard. Pet. App. 368a.

Petitioner also argued that only a court-martial panel composed of 12 members can constitutionally



impose the death penalty. The Army Court of Military Review found that claim meritless on the authority of *Curtis* (Pet. App. 230a), which rejected that claim on the grounds (1) that the jury-trial requirement of the Sixth Amendment does not apply to courts-martial, Pet. App. 375a-376a (citing *Ex parte Quirin*, 317 U.S. 1 (1942)), (2) that a civilian judge alone may be entrusted with imposing a death sentence, Pet. App. 376a (citing, *inter alia*, *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), and *Spaziano* v. *Florida*, 468 U.S. 447 (1984)), and (3) that the military justice system includes significant post-sentence safeguards to minimize the risk of erroneous imposition of the death penalty. Pet. App. 376a-377a.

3. The Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-227a. The court summarily rejected, on the authority of *Curtis* and *Matthews*, petitioner's claims that the President lacked constitutional and statutory authority to promulgate RCM 1004, and that a court-martial panel of fewer than 12 members may not constitutionally sentence a defendant to death. Pet. App. 128a-129a (challenge to size of court-martial panel); *id.* at 141a-142a (challenges to constitutionality of RCM 1004).

## ARGUMENT

1. Petitioner contends that Congress has not explicitly or implicitly delegated to the President any authority to prescribe aggravating factors (Pet. 14-15), and, if Congress has done so, such delegation is unconstitutional because that authority may not be delegated at all (Pet. 9-11), because the delegation impermissibly combines in the President the power to make and enforce laws (Pet. 11-14), or because Congress failed to set forth sufficient standards to guide

the President's exercise of his authority (Pet. 19-23). Those claims lack merit and do not warrant review.

a. In *Furman* v. *Georgia*, 408 U.S. 238 (1972), this Court held that the death penalty cannot be imposed under procedures that create a substantial risk that it will be inflicted in an arbitrary manner. See, *e.g.*, *McCleskey* v. *Kemp*, 481 U.S. 279, 301 (1987); *California* v. *Brown*, 479 U.S. 538, 541 (1987); *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (lead opinion). Contrary to petitioner's contention (Pet. 8-9), *Furman* did not hold unconstitutional Congress's judgment that the death penalty is a lawful punishment for premeditated or felony murder in the military justice system. See Art. 118, UCMJ, 10 U.S.C. 918. *Furman* requires only that appropriate safeguards exist in order for Article 118 to be implemented in a constitutional manner. Compare *Dobbert* v. *Florida*, 432 U.S. 282, 293-294, 297-298 (1977) (rejecting argument that there "was no death penalty 'in effect' in Florida" at the time of defendant's crime, because Florida had not yet acted to comply with the dictates of *Furman*; upholding retroactive application of Florida's post-*Furman* capital sentencing law on the ground that the changes were merely "procedural").

The President had ample authority to prescribe the safeguards that will result in the constitutional application of the statute that Congress enacted. In addition to his constitutional authority as "Commander in Chief of the Army and Navy," U.S. Const. Art. II, § 2, Cl. 1, three provisions of the Uniform Code of Military Justice make clear that the President has the power to devise sentencing procedures for capital cases. Article 18, UCMJ, 10 U.S.C. 818, which sets forth the jurisdiction of general courts-



martial, provides that such courts-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter." Article 36, UCMJ, 10 U.S.C. 836, empowers the President to prescribe "trial[] and post-trial procedures * * * for cases triable in courts-martial" by regulations that "shall, so far as [the President] considers practicable, apply the principles of law * * * generally recognized in the trial of criminal cases in the United States district courts." And Article 56, UCMJ, 10 U.S.C. 856, authorizes the President to limit the maximum punishment a court-martial may impose. See, *e.g.*, *United States* v. *Prescott*, 2 C.M.A. 122, 124-125, 6 C.M.R. 122, 124-125 (1952). Together, those Articles authorize the President to prescribe whatever procedures are necessary to assure that Article 118 can be implemented constitutionally.

Any doubt as to whether the UCMJ delegates to the President authority to promulgate RCM 1004 was eliminated by Congress's enactment in 1985 of Article 106a, UCMJ, 10 U.S.C. 906a, which makes it a capital offense for a servicemember to engage in espionage. That provision lists three specific aggravating factors and further states that aggravating factors include "[a]ny other factor that may be prescribed by the President by regulations under [Article 36]." See 10 U.S.C. 906a(c)(4). Article 106a therefore clearly reflects congressional understanding that the UCMJ, including Article 36, gives the President delegated authority to promulgate aggravating factors in capital cases. The conference report on the legislation makes the point even more clearly, stating that:

> Nothing in the new Article 106a is meant to preclude a prosecution under any other article of the UCMJ[.] * * *
>
> * * * * *
>
> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provisions of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles.

H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 425 (1985). Where Congress has, as it did here, passed new legislation in specific reliance on a particular interpretation of existing laws, there is strong reason to give effect to that interpretation. See, *e.g.*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2414 (1995); *Stone* v. *INS*, 115 S. Ct. 1537, 1545, 1549 (1995).[4]

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[4] Petitioner suggests (Pet. 18-19) that Article 106a evidences Congress's belief that the President lacks delegated authority to promulgate aggravating factors in capital cases, because Article 106a delegates that authority to the President only in espionage cases. The problem with that claim is that Article 106a(c)(4) expressly recognizes that the President's authority to promulgate aggravating factors will be exercised "under section 836 of this title (article 36)," 10 U.S.C. 906a(c)(4), a provision that is not limited to espionage cases. There is no greater merit to petitioner's contention that Article 106a should not be read to reflect congressional endorsement of RCM 1004, because the conferees "clearly indicate[d]" that Article 106a should not be "read as validating or invalidating" that Rule. Pet. 18. The conferees, however, endorsed the use of RCM 1004's procedures in espionage cases, and their statement that nothing in Article 106a would preclude prosecution under other provisions of the UCMJ or affect the "validity" of RCM 1004, can only be read as expressing agreement that RCM 1004 is lawful.



b. The President's exercise of that authority to promulgate aggravating factors does not violate the "nondelegation doctrine" or the Eighth Amendment. Petitioner's broad claim that the Eighth Amendment requires that Congress prescribe aggravating factors (Pet. 9-10) is not supported by this Court's cases. Nothing in the Eighth Amendment requires that a *legislature* provide the narrowing of death-eligible defendants required by this Court's cases. See, *e.g.*, *Zant* v. *Stephens*, 462 U.S. 862, 880 (1983) (to determine if jury's discretion is sufficiently channeled in capital cases, court may look to "court-imposed standards to govern the jury" in its deliberations).

As for the "nondelegation doctrine," it is directed to situations in which Congress is alleged to have given the Executive the power to "make a[] Law[]," Art. I, § 8, Cl. 18, in the first instance, rather than to "take Care that the Laws be faithfully executed," Art. II, § 3. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); *Field* v. *Clark*, 143 U.S. 649, 692 (1892).[5]

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[5] This Court has invalidated a law on the ground of improper delegation in only two cases: *Panama Refining Co.* v. *Ryan*, *supra*, and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). In each of those cases, the Court found that the statute at issue "declare[d] no policy" as to the subject matter of the delegation and left the Executive with "unlimited

Here, Congress *has* made the "law" governing the conduct of servicemembers. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, which includes the power to define crimes and affix their punishment, *Solorio* v. *United States*, 483 U.S. 435, 438-439 (1987). Article 118 is just such a "Rule[]"; it defines both the offense of murder and its punishment. Congress therefore has exercised its power to regulate the military. What Congress has done through Articles 18, 36, 56, and 106a is to give the President the power to ensure that Article 118 can be implemented in a constitutional manner by courts-martial. That power does not offend nondelegation principles.

Contrary to petitioner's contention that the powers already exercised by the President under the Constitution make him categorically ineligible for exercising additional delegated authority in this area (Pet. 12-14), this Court has recognized that the limits on Congress's delegation power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975); see also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950) (immigration); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322 (1936) (foreign affairs); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 12 (1926) (Commander-in-Chief power); cf. *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 220-223 (1989). This is such a case. As "Commander in Chief of the Army and Navy," Art. II, § 2, Cl. 1, the President has the inherent power to adopt measures necessary to promote military discipline, see *United States* v. *Eliason*, 41 U.S. (16 Pet.) 291, 301-302 (1842); see also *Kurtz* v. *Moffitt*, 115 U.S. 487, 503 (1885), or to regulate court-martial proceedings, cf. *Swaim* v. *United States*, 165 U.S. 553, 557-558 (1897). Indeed, this Court has consistently held that Congress can grant rulemaking authority to Article III courts, since that authority is a reasonable adjunct to their inherent power to adjudicate cases. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 387-388 (1989); *Hanna* v. *Plumer*, 380 U.S. 460 (1965); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1941); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Congress has no greater duty to specify the factors for the President to consider when he issues rules ensuring that courts-martial operate in a constitutional manner than Congress must specify for the federal courts to consider in ensuring that cases will be adjudicated properly.

Nonetheless, Congress has not left the President without guidance. Article 36 states that the court-martial rules promulgated by the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. 836. The "principles of law" recognized by the district courts include constitutional rules established by this Court's capital punishment decisions. *Gregg* approved the sentencing standards found in the Model Penal Code, 428 U.S. at 193-194 n.44 (lead opinion), and also upheld the

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authority to determine the policy * * * as he may see fit." *Panama Refining*, 293 U.S. at 415.

Georgia capital sentencing scheme, which generally follows the Model Penal Code, *id.* at 164-166 & n.9, 196-198 (lead opinion); *McCleskey*, 481 U.S. at 302 & n.24; see also *Proffitt* v. *Florida*, 428 U.S. 242, 248-249 n.6 (1976) (lead opinion). The aggravating factors in Rule 1004 have close analogues in the Model Penal Code and the Georgia and Florida statutes. See *Manual* A21-69. Moreover, Article 36 is not the only source of congressional policy in this regard. Congress has authorized the death penalty for various offenses, *Stanford* v. *Kentucky*, 492 U.S. 361, 372 n.4 (1989) (collecting laws), and those statutes evidence Congress's policy judgments about the conduct warranting that sentence. The President can take those judgments into account in formulating aggravating factors, and, as the court of appeals recognized in *Curtis* (Pet. App. 368a-375a), RCM 1004 does just that.

Nor does it matter whether the aggravating factors in RCM 1004 are viewed as in some sense "substantive" (Pet. 11 & n.16), because separation-of-powers analysis "does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural.'" *Mistretta*, 488 U.S. at 393. More important is the fact that the delegation challenged by petitioner "pose[s] no threat of undermining the integrity of the [Executive] Branch or of expanding [its] powers * * * beyond constitutional bounds," *ibid.*, for several reasons. First, as this Court recognized in *Mistretta*, "the [federal] sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch." *Id.* at 390. In the military context, that



responsibility has been historically shared principally by the Legislative and Executive Branches, because courts-martial have never been thought to be Article III courts. See *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858).[6] Second, the President's exercise of such rulemaking authority does not improperly consolidate the prosecution and sentencing functions, because the sentencing decision is left to servicemembers who are protected against improper in-

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[6] Congress has traditionally left sentencing in military prosecutions largely to the Executive Branch. Most of the offenses enumerated in the Articles of War of 1776 provided that the sentence upon conviction would be determined by the judgment of the court-martial. See W. Winthrop, *Military Law and Precedents* App. X. at 961-967 (2d ed. 1920 reprint). That practice was continued when Congress revised the Articles of War in 1806 and 1874, *id.* App. XII. at 976-981; App. XIII. at 986-991, and it extended to capital offenses. See, *e.g.*, Articles of War of 1874, Arts. 41-46 (each providing that defendant "shall suffer death, or such other punishment as a court-martial may direct"). In 1890 Congress directed that whenever the sentence was left to the discretion of the court-martial by the Articles of War, "the punishment * * * shall not, in time of peace, be in excess of a limit which the President may prescribe." Act of Sept. 27, 1890, ch. 998, 26 Stat. 491. Thus, a long history, predating the Constitution itself, shows that Congress has always understood the determination of court-martial sentences to be a matter properly resting within the special competence of the Executive Branch officials most directly responsible for the maintenance of military discipline. See A. Sullivan, *The President's Power to Promulgate Death Penalty Standards*, 125 Mil. L. Rev. 143, 157 (1989). Cf. *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986) (historical evidence is a valuable guide in separation of powers controversies).

fluence or retaliation. Cf. *Mistretta*, 488 U.S. at 393-395.[7]

Third, Articles 18, 36, 56, and 106a do not allow the President to impose capital punishment in cases where Congress has not itself authorized that pen-

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[7] Contrary to petitioner's repeated suggestions that the President or military commanders can easily exert improper influence over courts-martial and their members (Pet. 26-28 & nn.28, 31), the military justice system includes strong safeguards to prevent that from occurring. This Court recently found those safeguards significant in concluding that the Constitution does not require that military judges be given a fixed term of office:

> Article 26 * * * protects against command influence by precluding a convening officer or any commanding officer from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties. *Ibid.* Article 37 prohibits convening officers from censuring, reprimanding, or admonishing a military judge [or court-martial member] "with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding." 10 U.S.C. § 837. Any officer who "knowingly and intentionally fails to enforce or comply" with Article 37 "shall be punished as a court-martial may direct." Article 98, UCMJ, 10 U.S.C. § 898.

*Weiss* v. *United States*, 114 S. Ct. 752, 762 (1994). In addition, Article 51, 10 U.S.C. 851, provides that panel members must vote by secret written ballot, and Mil. R. Evid. 606(b) permits court-martial members to be questioned on "whether there was unlawful command influence," and that information may be used to impeach the verdict. See Pet. App. 17a-18a. Finally, as this Court recently noted, "[t]he entire system * * * is overseen by the Court of Military Appeals, which is composed entirely of civilian judges * * *. That court has demonstrated its vigilance in checking any attempts to exert improper influence." *Weiss*, 114 S. Ct. at 762.



alty. Those Articles only allow the President to limit or regulate its use. The President has always had the power to reduce a servicemember's sentence under his power "to grant Reprieves and Pardons," Art. II, § 2, Cl. 1, regardless of minimum and maximum penalties set by law. *Schick* v. *Reed*, 419 U.S. 256 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1856). And the President's power to channel the imposition of the death penalty is a reasonable adjunct to his authority to regulate courts-martial. Cf. *Mistretta*, 488 U.S. at 395-396. While RCM 1004, like the Sentencing Guidelines upheld in *Mistretta*, may influence servicemembers' actions, the Rule does not "bind or regulate the primary conduct" of servicemen, and does "no more than fetter the discretion of [courts-martial] to do what they have done for generations—impose sentences within the broad limits established by Congress." 488 U.S. at 396.

Finally, Congress's judgment that the President should have the authority to promulgate sentencing procedures, including aggravating factors for capital or noncapital cases, is sensible. This Court's decisions in cases such as *Gregg* have identified various procedures that satisfy the concerns underlying *Furman*. Because the President adopts the *Manual* for use by courts-martial, Congress could reasonably have believed that the President is in the best position to ensure that the procedures required by this Court's cases can be implemented quickly and revised when necessary in that specialized field, just as he can ensure that courts-martial follow whatever other rules are imposed by this Court or the military courts. Congress also could have believed that the President is in a better position to determine what

factors are necessary to ensure adequate military discipline. In those circumstances, the combined effect of the President's inherent Article II power and the authority given him by the UCMJ means that the President's power to adopt rules such as Rule 1004 is at its zenith. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

2. Petitioner also contends (Pet. 23-28) that the military sentencing procedures are unconstitutional because they allow a capital sentence to be imposed when, as was the case here, the court-martial panel consists of fewer than 12 members. See Article 16(1)(A), UCMJ, 10 U.S.C. 816(1)(A) (general court-martial may consist of "a military judge and not less than five members"); see also Article 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1) (unanimity required when court-martial imposes sentence of death). That claim finds no support in the controlling decisions of this Court.

While petitioner relies on this Court's decisions construing the Sixth Amendment Jury Trial Clause, Pet. 24, 26 (citing *Williams* v. *Florida*, 399 U.S. 78 (1970), and *Ballew* v. *Georgia*, 435 U.S. 223 (1978)), it is well settled that the Jury Trial Clause does not apply to courts-martial. *E.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).[8] The Fifth Amendment

[8] See also *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States*, 483 U.S. 435 (1987); *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986). Accord *Mendrano* v. *Smith*, 797 F.2d 1538, 1544 (10th Cir. 1986); *King* v. *Moseley*, 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley*, 289 F.2d 751, 752 (7th Cir. 1961). See generally G. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).



specifically exempts "cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin*, 317 U.S. 1, 39 (1942), neither Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Sixth Amendment right to a trial by a petit jury, he also had no right under the Jury Trial Clause to a court-martial panel composed of 12 persons.[9]

[9] In any event, an eight-person panel, as petitioner had, would be sufficiently large to satisfy the Constitution. *Williams* v. *Florida*, 399 U.S. 78, 86-103 (1970) (a six-person jury is sufficient). Petitioner's reliance (Pet. 26) on *Ballew* v. *Georgia*, 435 U.S. 223 (1978), is misplaced, because *Ballew* involved a five-person jury, whereas the panel in appellant's case had eight members. Indeed, petitioner does not claim that the panel was too small to find him guilty, but only to sentence him. The

Petitioner's reliance on the Eighth Amendment is similarly misplaced. The Eighth Amendment does not guarantee a defendant in a capital case (or in any other) the right to have the jury fix his punishment, even when a sentence requires specific findings of fact. See, *e.g.*, *Harris* v. *Alabama*, 115 S. Ct. 1031, 1034-1035 (1995); *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984). Thus, while petitioner is correct that this Court's cases reflect the need for a higher degree of reliability in capital cases, this Court has repeatedly rejected the claim that jury sentencing is an indispensable means to achieving that reliability.

Petitioner's claim fares no better under the Due Process Clause. Pet. 24-25 & n.26. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States*, 483 U.S. 435, 447 (1987). See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the number of members that may appropriately comprise a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action," *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); see also *Weiss* v. *United States*, 114 S. Ct. 752, 760-761 (1994), but also because the

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Sixth Amendment, however, does not require jury sentencing at all, even in capital cases. See, *e.g.*, *Hildwin* v. *Florida*, 490 U.S. 638, 639-640 (1989) (per curiam).



practices at issue have been carried forward from the earliest days of our nation. Cf. *Solorio* v. *United States*, 483 U.S. at 447.

In support of his due process argument, petitioner relies heavily (Pet. 24-25) on the fact that many States leave the capital sentencing decision to 12 jurors, rather than to some fewer number. Because some States, such as Florida and Arizona, leave the final decision to the trial judge, rather than to the jury, there is no societal consensus as to 12-person sentencing. And, in any event, the state experience is in the civilian capital sentencing context and therefore does not bear on the proper sentencing procedures for courts-martial. Compare *Weiss* v. *United States*, 114 S. Ct. at 760-761. In the military context, Congress's judgment as to the appropriate size of courts-martial is a reasonable one. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to serve as court-martial panel members, "the basic fighting purpose of armies is not served." *Ibid.* Congress reasonably determined that the rights of servicemen are adequately protected by the court-martial process without insisting on the further diversion of resources that would be required to provide 12-member panels in each case.[10]

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[10] Moreover, as the court of appeals noted in *Curtis*, defendants found guilty and sentenced to death by courts-martial enjoy safeguards not available to persons convicted and sentenced to death in civilian courts, including the convening authority's power to commute the sentence and the fact that "a

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1995

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Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence." Pet. App. 377a; see also *id.* at 152a (opinion below) ("the convening authority may set aside or reduce the sentence for any reason"). Indeed, unlike civilian appellate courts that review sufficiency claims under a deferential standard, *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. A court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. See Art. 66(c), UCMJ, 10 U.S.C. 866(c); *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977); see also *Ryder* v. *United States*, 115 S. Ct. 2031, 2037-2038 (1995); Pet. App. 152a (opinion below).

Supreme Court, U.S.
FILED
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No. 94-1966

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

DWIGHT J. LOVING,
*Petitioner,*
v.
UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

The United States, in its twenty-four page brief opposing the grant of certiorari in this case, made one summary statement that the Questions Presented "lack merit and do not warrant review." Brief in Opposition [hereinafter BIO] at 10. Nowhere else in its brief does the United States address any reason why this Court should not grant certiorari. Indeed, the entire brief addresses the merits of the Questions Presented and only highlights the need for this Court to grant certiorari to review these important constitutional issues of first impression and resolve these issues on the merits.

## I. THE PRESIDENT LACKED AUTHORITY TO ESTABLISH AGGRAVATING FACTORS IN CAPITAL CASES.

### A. Reply to U.C.M.J. Article 106a Argument.

Respondent argues that the conference report and the 1985 amendment to Uniform Code of Military Justice [hereinafter U.C.M.J.] article 106a, 10 U.S.C. § 906a, "reflects congressional understanding" and reliance on the premise "that the UCMJ, including Article 36 [10 U.S.C. § 836], gives the President delegated authority to promulgate aggravating factors in capital cases."[1] BIO at 11-12. Even assuming arguendo that this interpretation is correct, Respondent erred in citing this Court's opinions in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, —— U.S. ——, 115 S. Ct. 2407, 2414 (1995) and *Stone v. Immigration and Naturalization Service*, —— U.S. ——, 115 S. Ct. 1537, 1545, 1549 (1995), for the claimed proposition that "[w]here Congress has, as it did here, passed new legislation in specific reliance on a particular interpretation of existing laws, there is strong reason to give effect to that interpretation." BIO at 12.

In the first instance, *Babbitt* and *Stone* do not support the claimed proposition. These two cases declare only that, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Babbitt*, 115 S. Ct. at 2414 (quoting *Stone*, 115 S. Ct. at 1545). Thus, these cases support the opposite conclusion of that argued by Respondent, i.e. if Congress "understood" that it had already delegated authority to the President to establish aggravating factors in all capital cases then the express delegation of that authority in espionage cases is clearly superfluous and

[1] Petitioner disagrees with this assertion, but previously addressed this argument in the Petition and, therefore, will not repeat the argument herein. *See* Petition at 17-18.



has no "real and substantial effect." *Id.; see also Kent v. Dulles*, 357 U.S. 116, 130 (1958).

Second, Respondent's legal proposition is erroneous on its face. In essence, Respondent argues that Congress relied on the President's interpretation of U.C.M.J. article 36, 10 U.S.C. § 836 as granting authority to the President to establish aggravating factors, and therefore "there is strong reason to give effect to" the President's interpretation. BIO at 12. The error in this argument lies in the fact that the President's interpretation as allegedly relied upon by Congress is irrelevant and this Court cannot give it "effect" if Congress did not—both in intent and in fact—delegate authority to the President at or before the time Rule for Courts-Martial [hereinafter R.C.M.] 1004 was promulgated.

### B. Reply to Congressional Guidance Argument.

Respondent cites the synergy of the President's inherent authority as Commander-in-Chief[2] and U.C.M.J. articles 18, 36, 56, and 106a, 10 U.S.C. §§ 818, 836, 856, and 906a as delegating "ample authority" to the President to establish aggravating factors. BIO at 10. Yet, in discussing whether Congress set forth sufficient standards to guide the President in his exercise of that authority, Respondent cites only U.C.M.J. article 36 and other federal death penalty statutes.[3]

Respondent cannot have it both ways: if Article 36 does not delegate authority to the President to establish aggravating factors in capital cases, then it cannot be the basis for testing the validity of the delegation. Fur-

[2] This Court should note, however, that the United States Court of Appeals for the Armed Forces never addressed this issue. Pet. at 367a n.9 ("we need not consider what inherent authority the President would have in this area").

[3] Petitioner addressed the argument concerning other statutes previously. Pet. at 21-23.

thermore, if some other provision supplies a statutory basis for the President's authority then that same provision must be used to test the validity of the delegation and U.C.M.J. article 36 is irrelevant to the determination of whether Congress provided sufficient guidance to the President.

### C. Reply to Argument That It Is Sensible for the President to Establish Aggravating Factors.

Respondent argues that it is "sensible" for the President to have authority to establish aggravating factors in capital cases. BIO at 19-20. This argument is absolutely irrelevant to the Questions Presented. The issue is whether or not Congress delegated authority to the President in a constitutional manner. Even assuming this Court believes that delegation would be a reasonable and logical action, if Congress has not properly delegated authority to the President to establish aggravating factors in capital cases, this Court cannot affirm petitioner's death sentence. *See Kaiser Aluminum & Chemical Corporation v. Bonjorno*, 494 U.S. 827, 840 (1990) (courts cannot legislate).

## II. PETITIONER'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT WAS IMPOSED BY A COURT-MARTIAL COMPOSED OF ONLY EIGHT MEMBERS.

### A. Reply to Sixth Amendment Argument.

Respondent argues that petitioner "had no Sixth Amendment right to a trial by a petit jury." BIO at 21. This argument is irrelevant for several reasons. First, although the Petition cites some Sixth Amendment cases, petitioner's challenge is expressly raised pursuant to the Fifth and Eighth Amendments. Second, this issue pertains only to the sentencing phase of trial and petitioner has already recognized that a capital defendant has no constitutional right to jury sentencing. Pet. at 25 n.26.



Furthermore, contrary to Respondent's argument and citation to *Ex parte Milligan*, 4 Wall. 2, 123, 18 L.Ed. 281 (1866), *Ex parte Quirin*, 317 U.S. 1, 40 (1942), and other cases, this Court has never resolved the question of whether the Sixth Amendment right to trial by jury is applicable in court-martial proceedings. As Justice Rehnquist, writing for the Court, recognized in *Middendorf v. Henry*, 425 U.S. 25, 34-35 (1976) (quoting *Milligan*, 4 Wall. at 123), *Milligan* and *Quirin* say only in *dicta* that the Sixth amendment right to trial by jury is not available to military accuseds.[4] *See also Solorio v. United States*, 483 U.S. 435, 453 n.2 (1987) (Marshall, Brennan, and Blackmun, JJ., dissenting).

### B. Reply to Fifth Amendment Argument.

Respondent argues that petitioner has not been denied due process by a death sentence imposed by a court-martial composed of only eight members because the military practice of requiring only five members "has been carried forward from the earliest days of our nation." BIO at 22-23. Respondent misstates history.[5] The practice of allow-

[4] In *Milligan*, this Court dealt only with the issue of whether a citizen of Indiana, who never served in the military and had no military connection, could be tried by a military court for conspiracy against the United States in the Civil War. The Court held that the military had no jurisdiction. Likewise, in *Quirin*, this Court dealt only with the question of whether German citizens who entered the United States as spies during World War II could be tried by the United States military for violations of the laws of war. The Court held that the military did have jurisdiction. Thus, neither case presented the question that Respondent argues the Court decided.

[5] In addition, even if accurate, this historical argument is inapposite because a large number of legal practices which were viewed as constitutional two hundred years ago (or even one year ago) have been held to be unconstitutional. *See, e.g., Ryder v. United States*, —— U.S. ——, 115 S.Ct. 2031 (1995) (although numerous Coast Guard appellants have had their cases decided by civilian appellate judges who were appointed by the General Counsel of the Department of Transportation, this Court recently declared

ing only five members in general court-martial cases has only been carried forward since 1920. In fact, from 1775 until 1786, not less than thirteen officers (one President and twelve members) were required for every general court-martial. From 1786 to 1920, the Articles of War allowed for "any number of officers from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service." *See* Allred, *Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court-Martial Size and Voting Requirements*, 35 Naval L. Rev. 153 (Spring 1986); W. Winthrop, *Military Law and Precedent* (rev. & enlarged 2d ed. 1920).

Next, Respondent argues that requiring only five panel members in military cases is reasonable because the function of the military is to fight wars, and if servicemembers are diverted from that function to serve as court-martial members that function is abrogated. BIO at 23. Respondent cannot, however, credibly argue that in a de minimis number of cases, the United States military cannot spare twelve servicemembers from other duties to make the important determination of whether an accused shall live or die.[6]

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that appointment of civilian judges in this manner violates the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2); *Coker v. Georgia*, 433 U.S. 584 (1977) (after hundreds of people were executed in this country for committing a rape, this Court held that the Eighth Amendment is violated when a death sentence is imposed for the crime of raping an adult woman when the victim does not die).

[6] This argument, especially in the context of a capital case, is no more credible now then it was one hundred and fifty years ago.

> [I]t was held, at an early period, (1810), by Atty. Gen. Wirt, that . . . "It is difficult to conceive an emergency so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, without manifest injury to the service. . . ."

Winthrop at 79 (footnote omitted). In fact, this argument has even less credibility now when the armed services are composed of hundreds of thousands—if not millions—of servicemembers.



## CONCLUSION

In sum, petitioner's status as a servicemember did not strip him of his constitutional rights as an American citizen. Likewise, labelling his trial as a military court-martial did not strip him of his constitutional rights, including the right to due process and the right to protection from cruel and unusual punishment. This Court should grant certiorari to ensure that the military justice system, at least in capital cases tried during peacetime, is in fact a system of justice conducted in a manner consistent with the United States Constitution.

Respectfully submitted,

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DWIGHT J. LOVING, *Petitioner,*

V.

UNITED STATES OF AMERICA, *Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

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## BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

---

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In The

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

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## BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

---

### INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division (the Division) represents Navy and Marine Corps personnel on appellate review of court-martial convictions. The Division currently represents two capital appellants and expects to assume representation of two more death-sentenced service members before the end of the year. The issues presented in the *Loving* petition for certiorari are of particular interest to the Division because these issues will directly impact appellate review of the four death sentences currently adjudged in the Navy and Marine Corps.

Moreover, if recent history is any guide, the Navy and Marine Corps can expect at least one capital court-martial annually. Thus, the Court's resolution of these issues is of utmost importance to presently death-sentenced service members and future capital accused. As required by Rule 37, the Division has sought and obtained consent of both parties prior to filing this brief.

## ARGUMENT

### I. THE PRESIDENT'S PROMULGATION OF AGGRAVATING FACTORS WHICH BY THEIR OWN FORCE RENDER CERTAIN SERVICE MEMBERS DEATH-ELIGIBLE EXCEEDED HIS CONSTITUTIONAL AUTHORITY TO ENFORCE THE LAWS, VIOLATED THE DOCTRINE OF SEPARATION OF POWERS, AND DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

In promulgating Rule for Court-Martial (R.C.M.) 1004, the President elevated certain offenses under the Uniform Code of Military Justice (U.C.M.J.) to capital status. Although several U.C.M.J. provisions authorize death as a possible punishment, *see, e.g.*, Art. 118, U.C.M.J., 10 U.S.C. § 918 (authorizing death for premeditated or felony murder), Art. 85, U.C.M.J., 10 U.S.C. § 885 (authorizing death for desertion in time of war), only two codal provisions, by their own force, empower a court-martial to adjudge death. Art. 106, U.C.M.J., 10 U.S.C. § 906 (mandating death for spying in time of war); Art. 106a, U.C.M.J., 10 U.S.C. § 906a (specifically listing aggravating factors for espionage offenses).

Thus, before any court-martial may adjudge death, it must apply the provisions of R.C.M. 1004 as prescribed by the President. By any measure, therefore, R.C.M. 1004 has



the force of law. *See United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) ("Because of their promulgation under authority delegated by Congress, many provisions of the Manual for Courts-Martial . . . have the force of law.") (citing *Paul v. United States*, 371 U.S. 245 (1963) (other citations omitted)). That fact, however, should give this Court pause--the President's power, as defined in Article II, § 3 of the Constitution, is to enforce the laws, not to legislate; that is a function exclusively reserved to Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (The Steel Seizure Case).

In The Steel Seizure Case, this Court held that Article II did not empower the President to seize the nation's steel mills absent an indication that Congress had delegated that power to him. In his concurring opinion, Justice Jackson addressed the Government's argument that the President's seizure powers were inherent in his power to enforce the laws:

> The third clause in which the Solicitor General finds seizure powers is that "he shall take Care that the Laws be faithfully executed . . . ." That authority must be matched against the words of the Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." One gives the governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no further. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.

*Id.* (footnotes omitted; other omissions in original). In

Petitioner's case, as in The Steel Seizure Case, the President enforced the "law" which he alone enacted. In such cases, the system is less a system of laws than it is a system of men, and it is therefore unfaithful to the principle of separation of powers.

Additionally, the language of the Due Process Clause itself undermines any view that the President acted constitutionally in enacting R.C.M. 1004: the Constitution guarantees that no person shall be deprived of life, liberty, or property, without due process of law. As Justice Jackson recognized, law is a product of the legislative, not executive branch. It is a check on executive authority, not a creature of that authority. *Id.*

*Amicus* recognizes that in this case, unlike The Steel Seizure Case, Congress has delegated some power to the President. *See* Art. 36(a), U.C.M.J., 10 U.S.C. 836(a) (permitting the President to prescribe procedural rules as well as modes of proof). Congress, however, did not delegate the function at issue here, nor could it do so without violating the doctrine of separation of powers. *Cf.* The Steel Seizure Case. Even if Congress could delegate the power to prescribe aggravating factors, it did not do so under Article 36.

Article 36, U.C.M.J. authorizes the President to prescribe procedural rules and "modes of proof," not the aggravating factors which by their own force render certain military accused death-eligible. In other words, the aggravating factors delineated in R.C.M. 1004 are substantive rules because they alone determine which accused service members may be executed for their offenses. As such, they should have been the product of legislative rather than executive action. *See Whalen v. United States,* 445 U.S. 684, 689 (1980) ("the legislative power, including the power to . . . prescribe punishments to be imposed . . . resides wholly in Congress."); *cf. Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) ("[T]he discretion to delimit the



categories of crimes justifying detention, like the discretion to define criminal offenses and prescribe punishments, resides wholly with the state legislatures."). Accordingly, by promulgating substantive rules which define certain offenses as capital, the President has exceeded the scope of power delegated to him by Congress and has thereby violated the doctrine of separation of powers.

Notably, Article 36 directs the President to prescribe procedural rules in a manner consistent with "the principles of law and rules of evidence generally recognized in the trial of criminal cases in United States District Court." Art. 36(a), 10 U.S.C. § 836(a). R.C.M. 1004, however, is directly contrary to current practice in U.S. District Court where Congress alone prescribes the aggravating factors for capital offenses. *See* 18 U.S.C. § 3592 (prescribing aggravating factors applicable in federal civilian capital proceedings). Thus, Article 36 did not authorize the specific rules at issue here because they do not conform to current practice in federal district court. *See generally Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990) (discussing the scope of the President's procedural rule-making power under Article 36, U.C.M.J.).

In *Dodson*, the Tenth Circuit Court of Appeals recognized that the President's rule-making authority within the military justice system parallels this Court's power to prescribe rules of practice and procedure in the federal civilian jurisdiction. *See id.* at 1257 (citing *Levy v. Reasor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399, 403 (1967)). *Amicus* agrees with this view and notes that this Court's rule-making authority has never been extended to substantive matters of the kind presented here. In fact, Congress' promulgation of aggravating factors applicable in federal civilian cases indicates the limit of this Court's rule-making authority. The President's authority is similarly limited.

In sum, this Court should grant certiorari in Petitioner's

case to address whether the President's promulgation of aggravating factors in R.C.M. 1004 comported with Article II of the Constitution, the doctrine of separation of powers, and the Fifth Amendment's Due Process guarantee.

## II. A SENTENCE TO DEATH BY A PANEL COMPOSED OF AS FEW AS FIVE MEMBERS, VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE CONSTITUTION BECAUSE THE RESULT IS AN ARBITRARY, UNRELIABLE, AND INCONSISTENT APPLICATION OF THE DEATH PENALTY.

A military jury, referred to as a panel of "members," is composed of officers,[1] who are generally detailed to serve on a court-martial by the commanding officer of the accused, otherwise known as the "convening authority." The convening authority is the individual, who in his sole discretion, determines whether an accused will go to a court-martial. The convening authority's role in the military is similar to that of a district attorney or U.S. Attorney. *See United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987) ("In referring a case to trial, a convening authority is functioning in a prosecutorial role.") While the role of the convening authority is similar to a U.S Attorney, a convening authority possesses even greater discretion, responsibility, and control over a case. As such, the convening authority has the discretion to grant or deny continuance requests (R.C.M. 707); the authority to order depositions (R.C.M. 701); the authority to approve or deny

[1] An enlisted accused may request to be tried by a court-martial including enlisted members. R.C.M. 903. Except in cases where the death penalty can be adjudged, an accused can request to be tried by military judge alone, but in all capital cases the accused loses this choice and must be tried by members. R.C.M. 201 (f)(1)(C).



witness requests (R.C.M. 703); the authority to approve requests for expert assistance and expert witnesses (R.C.M. 703); the authority to grant immunity (R.C.M. 704); the authority to approve a pretrial agreement limiting the punishment an accused can receive at a court-martial (R.C.M. 705); the authority to order an inquiry into the mental responsibility of an accused by competent medical authorities (R.C.M. 706); the authority to cause charges to be withdrawn from consideration by a court-martial (R.C.M. 604); the authority to place an accused in pretrial confinement (R.C.M. 304); and, post-trial, the convening authority can suspend, disapprove, or execute a sentence awarded at a court-martial, approve or disapprove the findings of a court-martial, and order a rehearing (R.C.M. 1107, 1108).

Particularly relevant to the military accused is the fact that the convening authority has the sole discretion and authority to decide whether an accused's court-martial can sentence him to death. R.C.M. 201. This process is known as "referral" and consists of an order, by the convening authority, that charges against an accused will be tried by a specified court-martial. R.C.M. 601. When the convening authority authorizes the death penalty as a possible sentence the case has been "referred capital". R.C.M. 201.

The convening authority personally details members who, in the convening authority's opinion, are best qualified by age, education, training, experience, length of service, and judicial temperament. Article 25, U.S.C. § 825. Additionally, the convening authority determines the number of members that will serve on a court-martial, with the only requirement being that a general court-martial consist of not less than five members. Article 16, 10 U.S.C. § 816. The fact that the convening authority can influence the number of members that will hear a case becomes very significant because a military accused is

limited to only one peremptory challenge regardless of the number of members detailed to a case and regardless of capital referral. R.C.M. 912 (g)(1).

Concerning the potential a convening authority has to influence members, this Court has stated, "the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law . . . ." *O'Callahan v. Parker*, 395 U.S. 258, 264 (1969).

For an accused to be eligible to receive the death penalty, the military requires that the members find, beyond a reasonable doubt and by a unanimous vote, that the accused is guilty.[2] R.C.M. 1004. In awarding a sentence of death, the members vote on the sentence must also be unanimous. R.C.M. 1004.

Fifth Amendment procedural due process examines the criminal process by determining whether it "offends some principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 112 S. Ct. 2572, 2577 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)). It is well established that "[a]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 826, 836 (1941). Trial by a jury in serious criminal cases is fundamental to the American scheme of justice and essential to due process of law. *Burch v. Louisiana*, 441 U.S. 130, 133 (1979) (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

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[2] A unanimous vote as to a capital offense is only required for the accused to be eligible to receive the death penalty. An accused can be found guilty of the offense charged if two-thirds of the members vote for a finding of guilty, however, he would not be death eligible as to that offense.



As juries become smaller and smaller they begin to lack reliability and consistency. *Ballew v. Georgia*, 435 U.S. 223, 242 (1978). "In capital cases, for example, it appears that no State provides for less than 12 jurors--a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." *Williams v. Florida*, 399 U.S. 78, 103 (1970). This Court has "consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Strickland v. Washington*, 466 U.S. 688, 704 (1984) (Brennan, J., concurring in part/dissenting in part). Additionally, "[t]ime and again the Court has condemned procedures in capital cases that might be completely acceptable in ordinary cases." *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting).

Being convicted and sentenced to die by a panel of less than twelve members, lacks fundamental fairness, and utilizes a process of imposing death that is arbitrary, capricious, unreliable, and inconsistent.

The convening authority possesses, under the military death penalty scheme, the ability to influence the outcome in any capital case. Once a convening authority has referred a case as capital, the accused is precluded from pleading guilty, (R.C.M. 910), and loses the option of proceeding to trial by military judge alone. R.C.M. 201. Thereby, a members court-martial is the only means by which a military accused can be tried capital. As this Court stated in *Duncan v. Louisiana*, 391 U.S. 145 (1968), "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156. Unfortunately, this safeguard is absent in the military where the convening authority, also the chief prosecutor,

hand picks the members[3] of an accused's court-martial, and determines how many will be detailed to the court.

In *Ballew*, Justice Blackmun, relying upon empirical data, came to five conclusions concerning the decrease in the size of juries:

First, the decline of jury size reduces effectiveness of group deliberation, leads to inaccurate fact finding and incorrect application of common sense to the facts, reduces the quality of group performance and productivity, and the ability of the group to overcome member biases and obtain an accurate result is hindered. *Id.* at 232-34.

Second, the risk of convicting an innocent person increases as the jury size declines, and inconsistency increases as well. *Id.* at 234-35.

Third, the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and the variance amounts to an imbalance to the detriment of one side, the defense. *Id.* at 236.

Fourth, minority viewpoints and representation on juries will decrease. *Id.* at 236-37.

Fifth, in close cases the jury has its greatest value. Where the guilt or innocence of an accused is not readily apparent, a properly functioning jury system will tend to insure accurate fact finding. *Id.* at 237-39.

Where death is the potential outcome for an accused at a court-martial, reliability should be paramount to ensure that the sentence was not arbitrarily awarded. To ensure this reliability, a factfinding system should enhance group deliberation, accurate fact finding, quality group performance and productivity, consistency, and representation of minority interests.

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[3] These members are selected from the command structure of which the convening authority is in charge. A command structure which by its very nature requires the members to follow and obey the orders and directions of the convening authority.



Presently, a convening authority can arbitrarily choose the number of members that will serve on a court-martial, with the only requirement being that he detail at least five members. As the system currently operates, there is no consistency in the size of panels. An accused could be tried by a panel consisting of five, eight, or fifteen members, based upon the number of members detailed by the convening authority and the number of challenges for cause granted by a military judge. This variance in the size of panels creates an inconsistent and arbitrary application of the death penalty in violation of the Eighth Amendment. *See Furman v. Georgia,* 408 U.S. 238, (1972) (Stewart, J., concurring) (recognizing that the Eighth Amendment precludes the arbitrary and capricious imposition of the death penalty as would lead to freakish results).[4]

For example, two similarly-situated capital accused may be tried by widely disparate numbers of members based solely on the whim of the convening authority. One could be tried by a panel of five members while the other could be tried by a panel of twelve. Because there is a unanimity requirement for death, one accused may have a better chance of not receiving the death penalty solely by virtue of the discrepancy in panel size. This situation violates the due process guarantees of the Fifth Amendment and the reliability requirements of the Eighth Amendment.

As this Court noted in *Duncan v. Louisiana,* a jury trial safeguards against the corrupt or over zealous prosecutor. *Id.* at 156. In the military the convening authority--the functional equivalent of the chief prosecutor--can subjectively affect a court-martial by who and how many

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[4] Article 55 of the U.C.M.J., which prohibits "cruel **or** unusual punishment," provides additional protection to service members. 10 U.S.C. § 855; *see United States v. Matthews,* 16 M.J. 354, 368-69 (C.M.A. 1983).

of his subordinates he decides to detail to the court. This subjectivity undermines the fundamental fairness of being tried by a jury, can unlawfully influence the finding of a court, and creates an inherently unreliable system by which the military sentences people to death. Mandating twelve members would create consistency and enhance reliability.

## CONCLUSION

The President's promulgation of aggravating factors in R.C.M. 1004 failed to comport with Article II of the Constitution, the doctrine of separation of powers, and the Fifth Amendment's Due Process guarantee.

As Justice Frankfurter observed, "'Due Process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-163 (1951). A process which requires a minimum of twelve members in capital cases will enhance the deliberative process, heighten the reliability of courts-martial, and create a process that is consistently applied for each accused facing the death penalty.

As Justice Ginsburg has stated, "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *Weiss v. United States*, 114 S. Ct. 752, 769 (1994) (Ginsburg, J., concurring). This Court should address whether the President's promulgation of aggravating factors violates separation of powers, and whether a sentence to death by a panel composed of less than twelve members violates the Fifth and Eighth Amendments to the Constitution.



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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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DWIGHT J. LOVING,
*Petitioner*
v.
UNITED STATES OF AMERICA,
*Respondent*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

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## BRIEF OF UNITED STATES AIR FORCE LEGAL SERVICES AGENCY, APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

---

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### INTEREST OF THE *AMICUS CURIAE*

The United States Air Force Legal Services Agency relies upon its Appellate Defense Division to represent Air Force personnel pursuant to 10 U.S.C. § 870 during appeals of their court-martial convictions and sentences. This division currently represents Senior Airman Jose Simoy, who, like Petitioner Dwight J. Loving, is under a sentence to death and is incarcerated at the United States Disciplinary Barracks, Fort Leavenworth, Kansas due to the findings and sentence of a general court-martial. Not only was our current client, Senior Airman Simoy, tried under the same court-martial procedures which tried and sentenced Petitioner, but all Air Force

personnel whose cases may be tried as a capital case are potentially at risk of a death sentence imposed by the same suspect procedures which are addressed as Issues I-IV in Petitioner's brief. Unless a writ of *certiorari* is issued and Petitioner's relief is granted, not only are significant rights of Air Force personnel at issue, but their very lives are at stake. The Appellate Defense Division is vitally interested in providing this Court with our perspective and insight on this area of the law and join Petitioner in support of this Court granting a writ of *certiorari*.

## SUMMARY OF ARGUMENT

The establishment of aggravating factors and procedures to be used in military capital cases is a legislative decision vested exclusively in Congress which may not be delegated.

## ARGUMENT

### PURSUANT TO THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE DOCTRINE OF SEPARATION OF POWERS, THE ESTABLISHMENT OF AGGRAVATING FACTORS TO BE USED IN CAPITAL CASES IN THE ARMED FORCES TO NARROW THE CATEGORY OF PERSONS ELIGIBLE FOR THE DEALTH PENALTY IS A LEGISLATIVE DECISION VESTED EXCLUSIVELY IN THE CONGRESS WHICH CANNOT BE DELEGATED TO THE PRESIDENT.

Military laws, in many respects, differ from federal criminal laws and state criminal laws. Nevertheless, even military appellate courts have not hesitated to ensure that those who defend our nation's interests must not be deprived of Constitutional protections in courts-martial without strict analysis of and convincing evidence of military necessity.[1] In Petitioner's case, the absence of legislatively produced and sanctioned capital sentencing procedures unconstitutionally deprived Petitioner (and others) of the system of checks and balances in place to ensure that the Constitutional protections guaranteed to United States citizens are fully realized.

[1] *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) indicates that "the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Citing Kauffman v. Secretary of the Air Force*, 135 U.S. App. D.C. 1, 415 F.2d 991 (1969).



Further, no good and cogent reason has been advanced by appellate courts to justify any type or aspect of "military necessity" mandating less stringent safeguards in capital sentencing for military members. In fact, our military has been "all-volunteer" for decades and no evidence demonstrates the need for less stringent capital sentencing procedures in order to preserve our national defense or to preserve good order and discipline in the ranks. Arguments for a separate standard for military capital punishment processes are neither persuasive nor justified.

Capital cases particularly are subject to exacting scrutiny and procedural review in recognition of the finality and harshness of the sentence. *See generally, Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Johnson v. Mississippi*, 486 U.S. 578 (1988). This Court has frequently and strongly indicated its demand that capital sentencing procedures be the product of the legislative branch with the responsibility over the crime and the person. *See generally, Whalen v. United States*, 445 U.S. 684 (1980) and *Gregg v. Georgia*, 428 U.S. 153 (1976). Despite this, the Court has never squarely faced the issue of the constitutionality of military capital sentencing procedures.

Admittedly, in administering military criminal justice matters, the President has historically been granted broad control over the military as commander-in-chief.[2] How-

[2] 10 U.S.C. § 836 grants the President only general powers to prescribe pretrial, trial, and posttrial procedures.

ever, it is now time to address the improper and overbroad delegation of legislative power which has occurred not only in Petitioner's case, but in other military capital cases as well, in light of the special concerns which capital litigation raises, *post-Furman v. Georgia*, 408 U.S. 238 (1972). The military's capital scheme unconstitutionally violates the separation of powers doctrine, so essential to our federal government's effective administration of constitutional laws and its key role in dispensing justice. Allowing the President some large grant of power in recognition of his Constitutional role as Commander-in-Chief could and should be consistent with this Court's determination that, since "death is different", the military's capital punishment scheme must be one area which requires legislative rather than executive action.

## CONCLUSION

For the foregoing reasons, this Honorable Court should issue a writ of *certiorari* to the United States Court of Appeals for the Armed Forces, granting review of Petitioner's case. Issuance of the writ would ensure review of the constitutionally flawed, unacceptable court-martial processes which are employed in its capital cases.

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## BRIEF OF PUBLIC CITIZEN, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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## QUESTIONS PRESENTED*

1. Did the Court of Military Appeals err in upholding the issuance by the President of the constitutionally-necessary aggravating factors for death penalty offenses in the military (a) where the court found only an implicit delegation of that power by Congress to him; (b) the court was unable to find any explicit statutory language setting forth any intelligible principles to guide the President's discretion, and (c) where the delegation, if sustained, would unite in the President the power to make and execute the laws?

2. May a defendant be constitutionally sentenced to death by a lay court-martial panel of fewer than twelve persons?

*These questions are restated versions of the questions in the petition, but are substantively unchanged.

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## BRIEF OF PUBLIC CITIZEN, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The petition in this case raises two sets of questions that apply to every court martial in the Armed Forces in which the death penalty has been imposed or in which it will be sought. These questions were resolved in favor of the government by what was then called the United States Court of Military Appeals, and which has since been renamed the United States Court of Appeals for the Armed Forces. They were previously presented to this Court in *Curtis v. United States*, No. 91-99. However, by the time that the Court considered the petition in *Curtis*, the case had been remanded for further proceedings, and on that basis the Solicitor General urged the Court to deny the petition, which it did, with Justices White and Blackmun dissenting. 502 U.S. 1097 (1991).

In this case, the Court of Appeals for the Armed Forces, refused to reconsider *Curtis*, just as it had previously declined to reconsider it when the defendant in *United States v. Murphy*, No. 64,926 (USCAAF, argued June 5, 1995), specifically moved it to

do so, on an expedited and bifurcated basis, because of the applicability of the issues to every pending capital case. Order of September 23, 1993. Thus, it is clear that the court below will not revisit *Curtis*, thereby enabling this Court to avoid deciding these issues.

*Curtis* is still pending below, but petitioner Loving now asks this Court to review the issues that it declined to decide on interlocutory review in *Curtis*. Since the sentence of death imposed on petitioner is final, and not subject to further direct review, the Court should grant certiorari to consider these threshold issues that apply to the eight members of the Armed Services who are now subject to death sentences, as well as to every future case in which the death penalty is sought. If either of petitioner's claims is sustained, the defects must be corrected, as they surely can by appropriate action of Congress; if the government is upheld, then no court, prosecutor, or defense counsel need consider them further. As a thoughtful district judge (James B. McMillan, deceased) once observed in a similar context, "[t]he time to put on the roof is before it starts raining. The question of the constitutionality of the Price-Anderson Act should be decided now." *Carolina Environmental Study Group v. United States*, 431 F. Supp. 203, 226 (W.D. N.C. 1977), *rev'd on other grounds*, 438 U.S. 59 (1978).

## INTEREST OF THE AMICUS

Public Citizen, Inc. is a nonprofit organization with approximately 100,000 members throughout the United States. Through its Litigation Group, it has been lead counsel and otherwise participated in many of this Court's leading separation of powers cases, such as *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), *Mistretta v. United States*, 488 U.S. 361 (1989), and *Weiss v. United States*, 114 S. Ct. 752 (1994). It has also participated as co-counsel in *Curtis* and *Murphy*, *supra*, two other cases raising the identical issues presented by this petition.

This brief is being filed, with the written consents of the parties, because of Public Citizen's long-standing commitment to principles of separation of powers, which it believes were



disregarded by the Court of Military Appeals when it addressed these issues. Although Public Citizen agrees with petitioner, it is filing this brief to emphasize certain points that do not stand out in the petition, but that are central to the question of whether this Court should grant review.

## STATEMENT OF THE CASE

Petitioner, an Army private at the time of the offense, was convicted by a court-martial, consisting of eight Army officers, of having committed two murders, as well as several robberies and other crimes. Both victims were taxi drivers; one happened to be in the Army, working off-duty for extra money, and the other was a retired Army sergeant. One murder occurred on the base at Fort Hood, at the end of a ride that began in Killeen, Texas, and the other occurred in town, but began at Fort Hood.

The prosecution sought the death penalty under Articles 118(1) and 118(4), of the Uniform Code of Military Justice, 10 U.S.C. § 918(1) and §918(4) ("UCMJ"), which authorize the death penalty for premeditated and felony murders. The court-martial members, none of whom were judges or lawyers, voted to impose a death sentence. The conviction and death sentence were upheld by the lower courts over a variety of objections, including those raised by the petition — that the President lacks the authority under the applicable statutes and the Constitution to prescribe the aggravating factors that are a constitutional prerequisite for the imposition of any death penalty, and that a court-martial of fewer than twelve members may not impose the death penalty.

In order to clarify the issues relating to the power of the President, it is necessary to review briefly certain death penalty decisions of this Court and the Court of Military Appeals. Because the court below refused to reconsider its prior opinion in *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991), which decided these issues, we will then discuss *Curtis* before explaining why the writ should be granted.

A. *The Death Penalty in the Armed Forces*

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court ruled that the Eighth Amendment places significant limits on the government's power to impose the death penalty. Of particular relevance to this case is the requirement that the class of those convicted of capital crimes must be narrowed by rational criteria that confine the fact-finder's discretion concerning whether the particular circumstances warrant the death penalty. Although there was no reason to doubt the applicability of *Furman* to the military, it was not until 1983 that the Court of Military Appeals ruled that courts-martial could not impose death sentences because the military justice system failed to require that the sentencing authority "make specific findings as to individualized aggravating circumstances." *United States v. Matthews*, 16 M.J. 354, 380 (C.M.A. 1983). Although not necessary to the decision there, the *Matthews* court suggested that the gap could be filled either by Congress or the President. *Id.* at 380-81.

The President did not wait for Congress, but instead issued an Executive Order in January 1984 that amended the 1969 Manual for Courts-Martial by establishing a capital sentencing provision that sets forth specific aggravating factors for military death penalty offenses. Exec. Order 12,460, 49 Fed. Reg. 3169 (1984). In August 1984, when the current Manual came into effect, Executive Order 12,460 was rescinded, and the capital sentencing scheme was incorporated in Rule for Courts-Martial 1004. Manual for Courts-Martial, 1984, Exec. Order 12,473, 49 Fed. Reg. 17,152 (1984), quoted at App. 354a-360a.

As authority for Rule 1004, the President cited only the Constitution and Chapter 47 of Title 10, which is the entire UCMJ that was enacted in 1950, although the drafters of the Rule relied on Articles 18, 36, and 56 of the UCMJ and the President's authority as Commander-in-Chief of the Armed Forces under Article II, § 2, cl. 1 of the Constitution. However, the first of these, Article 18, does not delegate to the President the power to establish aggravating factors, but merely permits a court-martial to impose "any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter," subject to "such limitations as the President may prescribe." 10



U.S.C. § 818. The second, Article 36, authorizes the President to prescribe "[p]retrial, trial, and post[illegible]ial procedures, including modes of proof" for courts-martial, "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836.

The third statutory provision, Article 56, does not grant any authority to the President, but rather precludes a court-martial from imposing punishments which "exceed such limits as the President may prescribe[.]" 10 U.S.C. § 856. It makes no mention of the death penalty, although a number of provisions of the UCMJ provide a specific, and very different role for the President in capital cases. *See infra* at 13-14. Finally, the Commander-in-Chief clause in Article II makes no mention of the President's role in death penalty cases in the military, nor in any other matters relating to courts-martial; instead, the Constitution gives to Congress the power "To make Rules for the Government and Regulation of the land and naval Forces." Article I, § 8, cl. 14.

B. *The Decisions in Curtis*

Ronnie Curtis was convicted of murder, and the court-martial sentenced him to death, relying on Presidentially-promulgated Rule 1004 to supply the necessary aggravating factors. On appeal, Curtis challenged the President's authority to establish death penalty aggravating factors. The Navy-Marine Corps Court of Military Review, sitting en banc, rejected this argument. *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989) (en banc) (260a). The court ruled that death penalty aggravating factors are procedural rather than substantive and thus fall within the congressional delegation to the President of power to prescribe court-martial procedures. *Id.* at 280a-282a, citing 10 U.S.C. § 836 (1982). The court also found that Congress had provided the President with sufficient guidance to limit his discretion in establishing a military death penalty system. *Id.* at 282a-284a. Judge Albertson dissented from this portion of the opinion, reasoning that, even if Congress did delegate to the President authority to establish a military death penalty system,

such a delegation was unconstitutional because it was not accompanied by "specific and detailed standards" to guide the President. *Id.* at 338a.

On further appeal, the Court of Military Appeals bifurcated its consideration of the case, resolving systemic challenges to the imposition of the death penalty in the military before considering factual arguments unique to Curtis. Thus, in the first phase in *Curtis*, the court rejected the argument that the President acted without authority in establishing death penalty aggravators for courts-martial. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991) (Appendix F, App. 346a).

While the drafters of the Executive Order creating Rule 1004 specified three Articles in the UCMJ as sources for the President's authority to prescribe aggravating factors, the Court of Military Appeals barely mentioned them, and never attempted to demonstrate how they specifically authorized the President to establish aggravating factors for the death penalty. The court relied heavily on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (app. 362a-363a), but it specifically abjured any reliance on the President's inherent authority as Commander in Chief. App. 367a n.9. It also discussed at some length this Court's non-delegation opinions, including in particular *Mistretta v. United States*, 488 U. S. 361 (1989), but never pointed to specific statutory language by which to judge the delegation's validity.

Instead, the court upheld Rule 1004 on the theory that Congress did not object to the President's exercise of that power and seemingly approved it when it adopted its own military death penalty statute, limited to espionage, which sets forth three specific aggravating factors and explicitly authorizes the President to prescribe others for that crime, in an act that was passed a year *after* the President issued Rule 1004. *See* Pub. Law No. 99-145, § 534(a), 99 Stat. 634 (1985) (codified at UCMJ Art. 106a, 10 U.S.C § 906a). The court observed that "Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial" (App. 362a), and that it was "unaware of any indication of legislative displeasure with the President's action or any legislative effort at that time to undo his action to curtail the use of capital punishment in



courts-martial." App. 364a. Similarly, the court argued that the "failure of Congress to complain about the content of [Rule 1004] can be construed to be ratification" (App. 366a), and the "implication" from the passage of the special death penalty provision governing espionage is "that Congress does not consider the President's prescribing 'aggravating factors' to be in diminution of its own legislative power." *Id.* at 367a. Thus, the court said, "we conclude that Congress has — at least, implicitly — delegated this task [of prescribing the aggravating factors] to the President . . ." App. 367a n.9.

Satisfied that it had surmounted the statutory issues, the court turned to the constitutionality of the implicit delegation. To find the necessary guidance from Congress, the court again relied on the subsequently-enacted Article 106a and its authorization for the President to prescribe additional aggravating factors for espionage. From Article 106a's reference to Article 36, the court concluded that "[a]pparently Congress wished the President to look to the 'principles of law' applied in federal criminal cases in determining what should be the 'aggravating factors' for capital cases tried by court-martial." App. 368a. The court proceeded to examine the source of each of the aggravating factors in Rule 1004(c) (App. 368a-374a) in order to support its finding that "they reflect policy expressed by Congress in various statutes — including several punitive articles of the Uniform Code of Military Justice — and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty." App. 368a. It reinforced its conclusion by pointing out that "the President acted in reliance on legislative policy expressed in the Uniform Code of Military Justice and in other federal statutes," App. 374a, although Rule 1004 was issued precisely because none of those statutes contains the specificity required by *Furman*. The court then returned to Article 106a and its death penalty provisions for espionage, which it saw as an "approval of the standards which the President theretofore had employed" for all capital offenses covered by Rule 1004. App. 375a. Because the court found that "Congress not only acquiesced in his performance of this task but also tacitly ratified the 'aggravating factors' when it enacted Article 106a of the Uniform Code," it concluded that the delegation was proper. *Id.*

The opinion also rejected Curtis's Eighth Amendment argument that a defendant may not be sentenced to death by a panel of fewer than 12 lay persons. App. 377a; see also *id.* at 383a (Sullivan, C.J., concurring). In rejecting this contention, the court gave several reasons:

> Under RCM 1004, the court-martial members — who have been chosen pursuant to the criteria set forth in Article 25 of the Code, 10 USC § 825 — must be unanimous in finding aggravating factors. The military judge can, at least, recommend a commutation of a death sentence adjudged; and the convening authority is empowered to commute the sentence. Furthermore, a Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence.

App. 376a-377a (footnotes omitted). Although the court's statements may be factually correct, they do not explain why a civilian court may not impose a death penalty with a jury of fewer than 12 persons, but a court-martial may do so with as few as five members.

## REASONS FOR GRANTING THE WRIT

At stake in this case is whether members of the armed forces may be sentenced to death for offenses for which Congress has failed to specify the constitutionally-necessary aggravating factors, but where the President has acted to fill in that void, and if so, may the death penalty be imposed by fewer than 12 lay persons. In addition to petitioner, there are seven other servicemen who have been sentenced to death, but that hardly begins to define the affected class. Every person who is now or may in the future be charged with a crime for which the UCMJ permits the death penalty has a vital interest in the outcome of this case. That interest is triggered the moment that a capital charge is preferred, because the possibility that the ultimate punishment may be imposed potentially affects every strategic and tactical judgment in the case.



The military also has a vital interest in a definitive resolution of these issues. Until that occurs, every accused will have to raise both sets of issues, on direct appeal and on habeas corpus, as well as the numerous other issues that must be raised at every stage of a capital case, thereby consuming valuable resources of the courts and prosecutors. Indeed, the opinion below in this case is 221 pages in the appendix, and it does no more than mention the issues contained in the petition. If Rule 1004 is ultimately invalidated, or if 12 person panels are held to be mandatory in military death penalty cases, all eight military prisoners on death row will have their sentences reversed, and all of the death penalty litigation currently pending in the military courts will be radically altered. But whatever the outcome, the sooner these issues are resolved, the fewer of these challenges there will be to litigate. Thus, concerns for judicial efficiency and fiscal economy support a prompt resolution of the military death penalty's constitutionality.

### I. THE PRESIDENT'S AUTHORITY TO PROMULGATE AGGRAVATING FACTORS FOR CRIMES COMMITTED BY SERVICE MEMBERS PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN THE ARMED FORCES WHICH THE COURT BELOW DECIDED IN A MANNER INCONSISTENT WITH FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION AND SEPARATION OF POWERS.

A. Beyond the need to resolve both issues promptly, review is appropriate in order to resolve a conflict between the decision below regarding the President's authority and the Ninth Circuit's decision in *United States v. Harper*, 729 F.2d 1216 (1984), and the Fifth Circuit's ruling in *United States v. Woolard*, 981 F.2d 756, *rehearing denied*, 990 F.2d 820 (1993). Here, the Court of Military Appeals held that the President could, without violating separation of powers, prescribe death penalty aggravating factors, thereby aggregating in one person the power to decide what the law shall be, who shall prosecute the offense, and who shall be the judge and jury. In *Harper*, the Ninth Circuit overturned a district court's ruling that federal courts could adopt guidelines in order to

limit the circumstances in which the death sentence could be imposed under the Espionage Act, 18 U.S.C. § 794. The court concluded that such limitations must be "expressly articulated by the legislature in the statute authorizing the death penalty." *Id.* at 1225. In reaching that conclusion, the court noted that the Justice Department's brief in that case, as well as its public position in a number of other settings, was that it was the responsibility of Congress to satisfy the requirements of *Furman*. *Id.* at 1225-26. And in *Woolard*, the Fifth Circuit rejected the government's attempt to seek the death penalty without post-*Furman* congressional action. The Court of Military Appeals' holding that the President may prescribe aggravating factors is inconsistent with the Ninth Circuit's approach, if not its holding, as well as the Justice Department's stated position, at least until *Woolard* and *Curtis*. Indeed, the district court's approach in *Harper* would have been far less offensive to principles of separation of powers than the result below, yet the Ninth Circuit firmly rejected it, as did the Fifth Circuit in *Woolard* when similar "reinterpretation" efforts were rebuffed.

B. Review is also warranted because the decision below is at odds with basic principles of statutory construction and separation of powers. The first question that the Court of Military Appeals had to decide was whether Congress had authorized the President to prescribe the necessary aggravating factors. Instead of analyzing the language of the three UCMJ Articles that were cited to support Rule 1004, the court found an "implicit" delegation springing from congressional inaction or acquiescence, lack of stated displeasure, and inferences drawn from other statutes dealing with related, but different matters. On the basis of this implicit delegation, the court allowed the President to embark on an open-ended, unguided process of deciding those factors which do and do not warrant imposition of the death penalty for the various capital offenses. Whether the UCMJ provides the necessary authority in this very sensitive area is itself highly questionable, since all of the provisions relied on were enacted more than 20 years before *Furman*. *See United States v. Woolard*, *supra*, 981 F.2d at 758, rejecting claim that pre-*Furman* statute could satisfy *Furman* mandate. As Judge Fletcher observed in his concurrence in *Matthews*, the notion that Congress actually intended in 1950 to assign these powers to the President "implies



that, as a result of overabundant concern for the rights of servicemembers or as a result of mere happenstance, a unique system for imposing the death penalty evolved in the military without regard for civilian practice." 16 M.J. at 385-86.

But there is a more fundamental problem with an approach under which congressional silence can provide a basis for executive action: "Congressional inaction cannot amend a duly enacted statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n. 1 (1989). Nor should congressional silence be construed as endorsement of a regulation issued in the name of a statute. As Justice Scalia forcefully reminds us:

> [O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [congressional] intent from the failure to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

*Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., joined by Rehnquist, C. J., dissenting). As this Court made clear in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 958 (1983), Congress acts in one way only: by enacting laws that are passed by both Houses and signed by the President or enacted by two-thirds majorities over his veto.

The lower court's method for finding the necessary "intelligible principle" to guide the delegee's discretion, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), is similarly problematic. Rather than citing any statutory language guiding the President in selecting aggravators, the court turned to other federal statutes, state laws, and the Model Penal Code to find support for the factors chosen by the President. The court set sail on a wholly novel constitutional course, not followed by any other decision of this or any other Court. While this Court has deferred

to Congress to a considerable degree in passing on claims of excessive delegation, *see Mistretta v. United States*, 488 U.S. 361, 371-80 (1989), it has never sustained a delegation under one law by reference to a delegation under another law, let alone by reference to standards embodied in statutes from other jurisdictions and a Model Code enacted by no one.

This deviation from the norm is vastly compounded by the lower court's reliance on an implicit rather than explicit delegation as the basis from which the "intelligible principle" is to be derived. It is one thing to uphold a sweeping delegation when Congress has made an explicit choice to assign broad policy roles to the executive. It is quite another to do so when the delegation is not even found in a law that Congress passed, but is drawn from implications from other laws and congressional silence. If that theory of delegation were to be upheld, there would be no limits on executive power. Thus, the broad sweep of the lower court's decision provides another basis for review.

C. If the Court of Military Appeals relied on Article 36, App. 363a, its ruling is on no firmer footing. That provision applies only to "pretrial, trial, and post-trial procedures, including modes of proof," language that is far afield from the quite substantive and policy-laden decisions about what factors are sufficiently egregious as to warrant the death penalty. Surely, no one would argue that similar language authorizing this Court to issue rules of civil and criminal procedure, 28 U.S.C. § 2072, could be used to fill the comparable gaps under the federal criminal code, nor that those provisions could have been used to establish sentencing guidelines, yet that would seem to be the inevitable effect of construing Article 36 as the ruling below suggests. It is particularly indefensible to construe Article 36 broadly since the Court of Military Appeals had twice, after *Furman* and before *Matthews*, given it a narrow reading. *United States v. Frederick*, 3 M.J. 230, 236 (C.M.A. 1977); *United States v. Ware*, 1 M.J. 282, 285 (C.M.A. 1976).

Moreover, every state to have adopted death penalty aggravators since *Furman* has done so by legislation. At the very least that suggests that executive action is not the norm and that courts should be reluctant to conclude that Congress intended the UCMJ to grant this kind of power to the President. That view is



confirmed by the multiple references by this Court in *Furman* and other opinions to the role of the legislature in curing the defects in pre-*Furman* laws. *See* Petition at 10-11; *United States v. Harper*, *supra*, and the views of the Justice Department noted therein.

Contrary to the position of the court below, the presence of Article 106a, enacted after Rule 1004 was promulgated, supports petitioner and not the government. Article 106a is limited to espionage cases and specifies three conditions that warrant the death penalty. The fact that Congress was so explicit in this particular area, and that it decided to proceed by statute instead of simply allowing the President to adopt aggravators sua sponte, negates any inference that the President already had the power under Article 36 or otherwise to establish the necessary aggravating factors. Even more persuasive is the presence of the specific grant of authority in Article 106a(c)(4) for the President to add to the listed factors, using the procedures in Article 36. That grant would be wholly unnecessary if Article 36 or any other provision of the UCMJ already gave him that authority.

Another factor suggesting that Congress did not intend to silently empower the President to decide upon aggravating factors is the range of choices that such a decision entails. That can easily be seen from the lengthy list of aggravators that the President compiled for the military death penalty crimes, which include very different factors for the various offenses. See 356a-360a. As the government put it at page 70 of its brief of August 20, 1990, to the Court of Military Appeals in *Curtis*, the death penalty is "different in the character of the moral judgment that accompanies the identification of those circumstances and the conclusion that those circumstances are not outweighed by the available mitigating and extenuating factors." Whatever Congress thought would be included in Article 36's "procedures," moral judgments are plainly not among them.

D. Nor does the mention in Article 56 of the "limits" of punishment for the offense that "the President may prescribe" support Rule 1004. Assuming that the President may prescribe penalties for other offenses under the UCMJ, as this Court has often remarked, "death is qualitatively different." *E.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) That is especially true under the UCMJ because of the manifold roles that Congress

has assigned to the President in capital cases, many of which are inconsistent with his role as decider of which offenses are serious enough to warrant death. As *Weiss v. United States*, 114 S. Ct. 752 (1994), makes clear, the President, through each Service's Judge Advocate General, appoints and may remove all military judges. He is also the ultimate superior of the convening authority for all courts-martial, who appoints the members of the court-martial. Article 25(d)(2), 10 U.S.C. § 825(d)(2). In addition, pursuant to Article 71(a), 10 U.S.C. § 871(a), the President alone has the power to order that a death sentence be carried out or commuted. Moreover, Congress provided in Articles 118(1) and 118(4), under which petitioner was sentenced to death, that the court-martial is to decide whether the accused will receive the death penalty or serve a life sentence without the possibility of parole. Therefore, viewed as a whole, this scheme leaves no room for a Presidential role in establishing aggravating factors in death penalty cases, a conclusion that is reinforced by the specific, but limited, grant of such authority by Congress to the President in 1985 to prescribe additional aggravating factors for the crime of espionage.

E. Construing the UCMJ narrowly to reject a delegation to the President of power to prescribe death penalty aggravating factors would allow the Court to avoid the difficult question of the constitutional validity of such a standardless delegation. *See generally Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct 1759, 1771 (1991); *id.* at 1788-89 (O'Connor, J., dissenting). There is not a word in any statute or the legislative history to show what Congress intended the President to do, or not do, in establishing the aggravating factors for each capital offense. *Compare United States v. Mistretta*, *supra*, 488 U.S. at 375-79 (four page discussion of specifics of delegation). Given the range of choices for each capital offense under the UCMJ, the courts could not possibly determine whether the President complied with any "intelligible principle" for each, when there are essentially no directions under any of these provisions. Yet, *Touby v. United States*, 500 U.S. 160, 111 S. Ct. 1752, 1757 (1991), makes clear that the ability to obtain meaningful judicial review is an essential element of preventing excessive delegation, and that is impossible here.



We do not dispute that there were ample sources for the President to draw on in deciding which aggravating factors to chose for military death penalty cases. Rather, as the Court of Military Appeals proved, App. 368a-374a, the problem is that there are too many possible choices, and no guidance from Congress on how to select among them. Indeed, the court below found that some factors were derived from various federal statutes, others from state laws, and still others from the Model Penal Code, yet there is no rationale for relying on one source rather than another for a given offense — other than the personal predilections of the President, not the considered views of both Houses of Congress.*

F. At least as troubling is the concentration of power which such a delegation would create. In the armed forces, the President is the Commander-in-Chief, and hence the ultimate superior of those who bring charges against every accused. To allow the President to fill this vacuum would be to assign to the superior of the prosecutor the power to decide the circumstances under which an accused may live or die. The Framers were very concerned about uniting in one person the power to both write the laws and execute them, *The Federalist* No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961), as was Congress when it decided to place the Sentencing Commission in the judicial and not the executive branch. S. Rep. No. 98-225 , 98th Cong., 1st Sess. 159 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3342. Even if such a joinder did not violate separation of powers, the Court should not assume that Congress intended such a blending

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*Nor is this a situation, like *Mistretta*, where the job is so complex that Congress could not reasonably have been expected to do it on its own. State legislatures have satisfied the requirements of narrowing in *Furman*, and Congress has done it, although only for espionage, in the military. Moreover, when Congress passed the Federal Death Penalty Act of 1994, which is applicable to a range of federal crimes, and is set forth in 18 U.C.C.A. §§ 3591-98, it specified that the law does not apply to prosecutions under the UCMJ. Public Law 103-322, § 60004, 108 Stat. 1959, 1970 (1994).

of functions in the President unless there is the clearest language authorizing it.

But that presumption against concentration of powers is especially strong here because the Framers were so careful to divide the responsibility for military affairs between the President and Congress. Thus, Article II, § 2 makes the President the Commander-in-Chief, but it is Congress to whom the Framers gave the power "[t]o make Rules for the Government and Regulation of the land and naval Forces" under Article I, § 8, cl. 14. This special and quite specific division of power, beyond that embodied in the basic separation of powers doctrine, suggests a further concern about uniting executive and legislative power in the military context.

In light of the heightened scrutiny which the Eighth Amendment compels where the death penalty is involved, even the most explicit delegation, coupled with carefully drawn standards, would raise serious constitutional issues. Such issues can be avoided by construing Articles 18, 36, and 56 narrowly, thus denying the President the life and death power to promulgate the aggravating factors needed to reactivate the death penalty in the military. Identifying those factors which may place a defendant's life in the balance is precisely the kind of decision that has traditionally been made by legislative bodies who are most responsive to the will of the people, not by a single executive, with no checks and balances on the process.

* * *

The court below fundamentally erred when it assumed that Congress had implicitly delegated to the President the profound question of who shall live and who shall die. That question embodies judgments that go to the heart of our values as a society, and it should never be assumed that Congress would delegate that responsibility without saying so explicitly. Because neither the reasons given by the court below, nor those advanced by the Rule's drafters can sustain Rule 1004, and because of the importance of the issue to the administration of justice in the military, this Court should grant review on Question 1.



## II. THE CONSTITUTIONALITY OF ALLOWING A COURT-MARTIAL OF FEWER THAN TWELVE LAY PERSONS TO IMPOSE A DEATH SENTENCE IS AN IMPORTANT QUESTION OF FIRST IMPRESSION.

While this Court has never held that the Sixth Amendment right to trial by jury applies to courts-martial, the Eighth Amendment protects a capital defendant's right to a reliable process. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Article 55 of the UCMJ, which prohibits "cruel or unusual punishment," provides additional protection to service members. 10 U.S.C. § 855; *see United States v. Matthews*, 16 M.J. 354, 368-69 (C.M.A. 1983).

Article 16(1)(A) of the UCMJ allows a panel of as few as five lay members to impose a death sentence. 10 U.S.C. § 816(1)(A). Petitioner was convicted of a capital offense and sentenced to death by a panel of just eight lay members. The imposition of the death penalty by such a small group of lay members is inherently unreliable and, thus, impermissible under the Eighth Amendment.

A state may place the capital sentencing decision in the hands of a single judge, whose specialized training and experience makes him or her uniquely qualified to render such a decision. *Proffitt v. Florida*, 428 U.S. 242 (1976). Yet, with the exception of the military justice system, every jurisdiction in the country which permits lay members to make the capital sentencing decision requires that the panel include twelve members. *See* Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 Ind. L.J. 617, 627 n.45 (1989). Twelve person juries are particularly vital in view of the grave doubts that empirical research has raised about the fairness of any departure below a 12 person jury. *See* Kaye, *And Then There Were Twelve: Statistical Reasoning, The Supreme Court, and the Size of the Jury*, 68 Calif. L. Rev. 1004, 1033 (1980). Thus, even states which provide for smaller juries in non-capital criminal cases, require 12 when death is a possible penalty. *See, e.g.*, Fla. Stat. § 913.10 (1988).

The uniformity of 12 person juries in capital cases is significant because, as this Court has noted, "that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." *Williams v. Florida*, 399 U.S. 78, 103 (1970). Accordingly, this gross disparity in jury size is precisely the kind of "unusual punishment" that this Court found unconstitutional when it set aside capital punishment for a person who committed murder when he was under the age of 16. *Thompson v. Oklahoma*, 487 U.S. 815, 821-22 (1988).

One of the central themes running through this Court's Eighth Amendment jurisprudence is the concern that the death penalty not be meted out in an arbitrary fashion. But what could be more arbitrary than that petitioner's trial here was by court-martial, with a panel of eight, not a civilian jury of twelve, for what is no more or less than two murders, one punishable by the State of Texas and the other not, only because the fateful taxi ride ended up on a military base instead of in town? That the panel was composed entirely of military personnel — here all commissioned officers — is a necessary by-product of the authority granted the military to try civilian crimes, but that fact has no inevitable effect on the size of the court-martial panel.

Moreover, the UCMJ does not forbid twelve person panels, but only requires that panels cannot include fewer than five members. Article 16(1)(A), 10 U.S.C. § 816(1)(A). Thus, it cannot be said that Congress has a policy *against* twelve person juries in military capital cases, nor could it reasonably be argued that it is difficult to assemble a slightly larger venire than is presently provided since capital cases are tried in peacetime only on major bases and not out in the field or at remote outposts. There is nothing preventing the President from requiring 12 person panels by Executive Order, nor stopping any convening authority in a capital case from increasing a court-martial to that size on his own. Given the importance of 12 person juries in capital cases, the refusal of the United States to accord petitioner that vital protection here invalidates Loving's sentence and, if respondent still wishes to seek the death penalty, his conviction as well.



## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ARMED FORCES*

## JOINT APPENDIX

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| October 11, 1983: | Opinion of the United States Court of Military Appeals in *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983), holding that U.C.M.J. article 118 did not satisfy this Court's decisions in *Furman v. Georgia,* 408 U.S. 238 (1972) and *Gregg v. Georgia,* 428 U.S. 153 (1976), because of the omission of specific aggravating factors. |
| January 24, 1984: | President Reagan's Executive Order 12460 amends Paragraph 75 of the 1969 Manual for Courts-Martial by adding aggravating factors for capital cases which became Rule for Courts-Martial 1004(c) in the 1984 Manual for Courts-Martial. |
| July 29, 1985: | Congress enacts U.C.M.J. article 106a creating capital espionage offense and setting forth aggravating factors for that offense only. |
| December 11–12, 1988: | Offenses committed. |
| March 28, 1989: | Trial begins. |
| April 3, 1989: | Petitioner sentenced to death, dishonorable discharge, and forfeiture of all pay and allowances. |



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| February 3, 1992: | Convictions and death sentence affirmed by the United States Army Court of Military Review, *United States v. Loving,* 34 M.J. 956 (A.C.M.R. 1992), reprinted in Appendix to the Petition at 229a-256a. |
| Aril 15, 1992: | Timely petition for reconsideration denied in an opinion by the United States Army Court of Military Review, *United States v. Loving,* 34 M.J. 1065, (A.C.M.R. 1992), reprinted in Appendix to the Petition of 257a-265a. |
| November 10, 1994: | Convictions and sentence affirmed by the United States Court of Appeals for the Armed Forces, *United States v. Loving,* 41 M.J. 213 (1994), reprinted in Appendix to the Petition at 1a-227a. |
| February 2, 1995: | Timely petition for reconsideration denied without opinion by United States Court of Appeals for the Armed Forces, *United States v. Loving,* 42 M.J. 109 (1995), reprinted in Appendix to the Petition at 228a. |

U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW.

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NMCMR 87–3856.
28 M.J. 1074

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UNITED STATES

v.

RONNIE A. CURTIS, 511–74–5202, LANCE CORPORAL (E-3), U.S. MARINE CORPS.

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Sentence Adjudged 6 Aug. 1987.
Decided 30 June 1989.

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Accused, a lance corporal in the United States Marine Corps, was convicted by general court-martial convened at Camp LeJeune, North Carolina, Sebastian Gaeta, Jr., J., of homicide and sentenced to death and he appealed. The United States Navy-Marine Corps Court of Military Review, Strickland, J., held that: (1) procedures of the Rules for Courts-Martial for imposition of death sentence were properly promulgated; (2) delegation of power to the President to promulgate the rule was not unconstitutional; (3) trial counsel presented racially neutral explanation for preemptory challenge directed to one member; (4) death penalty was appropriate; and (5) it is not a denial of the equal protection to provide death penalty for service members while not providing for civilians.

Affirmed.

Byrne, C.J., filed an opinion concurring in part and dissenting in part.

Albertson, J., filed an opinion concurring in part and dissenting in part.

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LCDR L. Saccoccio, JAGC, USN, Appellate Defense Counsel.

LT. Scott A. Hagen, JAGC, USNR, Appellate Government Counsel.

Capt. Thomas D. Miller, USMC, Appellate Government Counsel.

Before the Court En Banc.

STRICKLAND Judge:

Appellant was tried at Camp Lejeune, North Carolina, by a general court-martial composed of officer and enlisted members. Contrary to his pleas, he was found guilty of two premeditated murders, larceny, burglary, unlawful entry, indecent assault and damage to Government property in violation of Articles 118, 121, 129, 130, 134 and 108, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 918, 921, 929, 930, 934, and 908, respectively. Additionally, in accordance with his plea, he was convicted of disobeying a general order in violation of Article 92, UCMJ, 10 U.S.C. § 892. On August 6, 1987, Lance Corporal Curtis was sentenced to death. The convening authority approved the sentence as adjudged.

We determined that this case presented issues of exceptional importance and, thus, pursuant to Rule 17, Courts of Military Review Rules of Practice and Procedure, decided to hear this case *en banc*.

Appellant raises seven allegations of legal error on appeal. We have carefully considered each assignment of



error in this capital case and will discuss each *seriatim*. Having reviewed the record pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866, we conclude that the assignments of error have no merit and that no prejudical error was committed which affects the findings or sentence.

## I

### Statement of Facts

Appellant, Lance Corporal Ronnie A. Curtis, reported to 3d Battalion, 2d Marines, 2d Marine Division, Camp Lejeune, North Carolina, in January 1985 and was assigned duties as a supply administrative clerk. His officer-in-charge was First Lieutenant James F. Lotz, the battalion supply officer. With the exception of an overseas deployment, Curtis and Lieutenant Lotz worked together in the same office for the next two years.

During this time period, Curtis visited Lieutenant Lotz's quarters aboard Camp Lejeune on several occasions; once for a supply section barbecue and on other occasions to pick up or deliver items related to supply work. As a result, Curtis learned the specific location of Lotz's quarters and, in addition, met Lieutenant Lotz's wife, Joan, who was a school teacher at the high school aboard the base.

Also during this time frame, Curtis, who is black, formed the perception that Lieutenant Lotz was racially prejudiced. This was apparently the result of certain nicknames used by Lotz such as "Bebop Curtis" and "Curtis Blow"; certain imitations of blacks done by Lotz; and, what Curtis perceived to be a different attitude toward and treatment of black Marines in the office. Curtis' perception of prejudice was flatly refuted by black friends

and acquaintances of Lotz, including a young black man who lived with the Lotzs and was treated like a son. Nevertheless, it was this perception which apparently led Curtis to the events of April 13 and 14, 1987.[1]

April 13, 1987, was a normal day in the supply section with Curtis going to work at 0730 hours as usual. Lieutenant Lotz was not in the office on this particular day, either in the morning or in the afternoon. Curtis got off work at 1630 hours and proceeded to his barracks room where he and his roommate listened to music for the next several hours. They then purchased a bottle of gin and continued to listen to music and drink mixed drinks for several more hours. During this time, Curtis consumed approximately one pint of gin.

According to Curtis' confessions and testimony, he then went for a walk and began thinking of the things that had been going on in the office and began thinking about Lieutenant Lotz picking on him. As he stood outside of the supply building where he worked, Curtis decided that he needed to kill his officer-in-charge.

Curtis determined he would use a knife to carry out his plan and he broke into the supply building, picked the lock on the security cage and stole a Marine Corps K-Bar knife (a large knife with a seven inch blade). Prior to leaving he damaged the office computer by throwing it on the floor. Next, he went back to his barracks room and obtained a

[1] Whether this perception was the actual or only motive for these killings is subject to question. For example, on the night of the murders, Curtis complained to his roommate that Lotz had recently forbidden office personnel from playing games on the office computers, a practice that had previously been tolerated. He expressed his displeasure over this and it may explain the fact that while Curtis was stealing the knife from the supply building he threw his office computer to the floor.



pair of gloves so that he would not leave any fingerprints at the Lotz house. Curtis then stole a bicycle for transportation and, while riding the 1.5 miles to the Lotz home, devised a scheme that he knew would get him inside the house.

Curtis arrived at the Lotz home sometime after midnight. He carried the knife concealed in the waistband of his pants. He left the bicycle in the backyard and went to the front door and knocked. Within minutes, Lieutenant Lotz appeared at the door. Curtis acted anxious and told Lotz that another Marine member of the supply section had been in an automobile accident and needed help. Lotz immediately asked Curtis inside and prepared to call the military police. As Lieutenant Lotz picked up the phone to assist one of his Marines whom he believed to be injured, Curtis withdrew the K-Bar from his waistband and stabbed the Lieutenant in the chest. Lieutenant Lotz tried to place a chair between himself and Curtis and called to his wife. Curtis then stabbed Lotz a second time in the back.

Within moments Joan Lotz emerged from the bedroom with a blanket wrapped around her. She first went to her dying husband and then confronted Curtis, kicking him in the shin with her bare foot and asking what they had ever done to him. Curtis then began to attack Mrs. Lotz. As she pleaded with him to stop, he stabbed her seven times in the head, neck and back. Then, as she lay on the floor dying, Curtis ripped and cut off her panties and fondled her vaginal area.

Curtis then searched the house to determine if any other persons were present with the intent that he would kill anyone he found. He rummaged through the house taking car keys and money for gas. He wiped clean the knife he had used in the killings and left the house, taking one of

the Lotzs' cars. This car, however, had a standard transmission and Curtis had difficulty driving it so he returned to the crime scene. He thereupon reentered the Lotz home, found some additional money, checked both bodies and left a second time taking their other car.

He drove around aimlessly for some period of time and ultimately decided to leave town. As he was traveling down the highway, Curtis momentarily fell asleep at the wheel and ended up crashing in the ditch. The state police arrived and, in the course of the accident investigation, Curtis admitted killing the Lotzs. He subsequently made several other confessions to these crimes.

## II

### Military Judge's Instructions

Appellant's first assignment of error is that the military judge improperly instructed the members as to the voting procedures they had to utilize to adjudge the death penalty. The military judge instructed the members that two votes were required in order to adjudge the death penalty. He instructed that, first, they must unanimously find at least one of the aggravating factors existed beyond a reasonable doubt and, second, they must unanimously find the death penalty to be the appropriate sentence. Appellant argues that, in addition, the members should have been instructed to vote and unanimously find that any extenuating or mitigating circumstances were substantially outweighed by any aggravating factors. This error is without merit because we find that the military judge properly instructed the members in accordance with the requirements of Rule



for Courts-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), United States, 1984.[2]

This assigned error arises as a result of the wording in R.C.M. 1004(b)(4), MCM, 1984, which states:

*Necessary findings.* Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) *All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances* admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule. (Emphasis added.)

Appellant asserts that in order for "all members [to] concur" as required by subsection (C), there must first be a vote in which all members unanimously find that the extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances. At trial, this same argument was made and the military judge, in denying appellant's request for this additional vote,

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[2]The appellant does not challenge R.C.M. 1004, MCM, 1984, as a Constitutionally impermissible capital sentencing scheme. In our review of this case, we are satisfied that R.C.M. 1004, MCM, 1984, comports with the mandates of the Supreme Court that the members be required to make "an individualized determination on the basis of the character of the [accused] and the circumstances of the crime" and that the members "adequately differentiated this case in an objective, evenhanded, and substantively rational way" before imposing the death penalty. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

indicated that "he [was] obligated to follow the procedures as set forth by the President." The military judge's ruling that this additional vote was not required is supported by the plain language of R.C.M. 1004(b)(7):

> *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

This subsection requires that only two votes be taken by the members and not the three requested by appellant. The last sentence of this subsection clearly speaks of the aggravating factor determination vote being followed by the sentence determination vote with no discussion or provision for an intermediate vote.

The absence of a requirement for a vote as to the balancing test does not relieve the members of their obligation to perform this test, it merely does not require that they memorialize the specific result. Appellant argues that without such memorialization there is no way to determine if all the members concurred that any extenuating or mitigating circumstances were substantially outweighed by any aggravating factors. We do not agree.

R.C.M. 1004(b)(6) requires that the military judge instruct the members as to the "requirements and procedures" they must use to adjudge a death sentence,



including instructions regarding the balancing test. We believe the military judge's instructions were in compliance with this provision. In his instructions, the military judge outlined a three-step procedure to be followed before a death sentence could be adjudged. These involved a determination of whether an aggravating factor existed, application of the balancing test and a consideration of whether death was appropriate. With respect to step two the judge instructed, in pertinent part:

> . . . [y]ou may not adjudge a sentence of death *unless* you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating factors as you have found existed in the first step of this procedure. (Emphasis added.)

The military judge thereafter instructed with respect to step three: "A sentence of death may be adjudged only upon the unanimous vote of all the members."

In following the judge's instructions (given orally, with written copies provided to the members), the members could only have voted for death after first finding that the extenuating or mitigating circumstances were substantially outweighed by any aggravating circumstances. Thus, it is implicit in the recorded, unanimous vote for the death penalty that each member properly applied the balancing test. No further memorialization is necessary. Therefore, we hold that the military judge properly instructed the members as to the number of votes which are required by R.C.M. 1004, MCM, 1984.

Included in this assignment of error is the allegation that the military judge overemphasized the requirement that the

members were required to unanimously concur in finding an aggravating factor, but underemphasized the requirement that the members could not adjudge a death sentence unless they all first concurred in the finding that any extenuating or mitigating circumstances were substantially outweighed by any aggravating circumstances. Appellant argues that because the military judge instructed on the first requirement seven different times but only mentioned the second requirement once, the members did not fully and fairly evaluate the evidence but instead adjudged the death penalty in a meaningless manner. We disagree.

Merely mentioning one requirement more than another during instruction does not alone constitute error. There must also be some indication that this resulted in the members improperly performing their duties. There is no such indication in this case. To the contrary, all indications are that the members properly deliberated according to the judge's instructions. Not only did the military judge in this case orally instruct the members, he also provided them written copies of the instructions. If the members had any questions or were confused as to the instructions given by the military judge they could have referred to their copies for clarification. Furthermore, if the members were still confused or did not understand the instructions even after referring to their copies, then they could have requested further clarification from the military judge in open court. However, because the members did not request further clarification in open court and because they could easily refer to their copies of the instructions, we are convinced that the members were neither misled nor misinformed as to their duties in adjudging an appropriate sentence. Accordingly, appellant was provided a fair and full evaluation of all the evidence pursuant to R.C.M. 1004, MCM, 1984, which guaranteed meaningful deliberations by the members prior to the imposition of the death sentence.



## III

### Presidential Promulgation of R.C.M. 1004

The procedures followed in this capital case in ultimately adjudging the death penalty were those set forth in R.C.M. 1004, MCM, 1984. R.C.M. 1004 was promulgated by the President as a part of MCM, 1984 and became effective 1 August 1984.[3] Appellant contends that the sentencing procedures are invalid because the President exceeded the power delegated to him by Congress under Article 36, UCMJ, 10 U.S.C. § 836, in that the rule is substantive in nature and not procedural.

Judge Albertson, in her dissent, agrees with this proposition, but goes even further in finding fault with the death penalty provisions of MCM, 1984. It is her position that Article 118, UCMJ, has been invalidated as unconstitutional as a result of the United States Supreme Court decision in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Alternatively, she argues that the President impermissibly encroached on the legislative powers of Congress in promulgating R.C.M. 1004 or, if the delegation could be construed as permissible, Congress failed to provide sufficient specific guidelines to prevent the President from acting arbitrarily.

We disagree with these arguments and find that Article 118, UCMJ, has not been rendered unconstitutional and that the Presidential promulgation of R.C.M. 1004 was legally valid.

#### A.

We turn first to an analysis of the post *Furman* status of

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[3]It was subsequently amended by Executive Order No. 012550 of 19 February 1986 (MCM, 1984, change no. 2).

Article 118, UCMJ. In *Furman* and its progeny, the Supreme Court struck down various state death penalty statutes as violating the Eighth Amendment because sentencing authorities were permitted to exercise uncontrolled discretion in determining whether to impose the death sentence. As Judge Albertson points out, the dissenters in *Furman* speculated as to the effect the decision might have on other existing state and federal statutes, including the Uniform Code of Military Justice. This speculation, however, was simply dicta and in no way directly affected any other statute, including the capital sentencing provisions of Article 118, UCMJ. The decision that did affect these provisions was handed down by the United States Court of Military Appeals in *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983). As a result, we must turn to *Matthews* to determine the status of Article 118, UCMJ.

In *Matthews,* the Court of Military Appeals held that the death sentencing procedures employed by courts-martial in capital cases were defective because of the failure to require the court members to make specific findings as to individualized aggravating circumstances which could be factually and legally reviewed on appeal. *Id.* at 380. This holding did not invalidate Article 118, UCMJ, as being unconstitutional. Instead, it merely found that the *procedures* utilized in imposing the death sentence were constitutionally inadequate. The Court recognized Congress' intent that the death penalty be a sentencing option only for certain offenses, including premeditated murder, *id.* at 380, and the Court noted the effect their ruling would have:

> Our ruling in this case . . . creates a void which must be filled promptly in order to effectuate the congressional intent that court-



> martial members have the option of imposing a death sentence for certain crimes.

*Id.* at 381.

However, the Court further specifically recognized the continuing vitality of Article 118 by setting forth two alternative means to remedy the deficiencies of the sentencing procedures, neither of which required that Congress reaffirm its intent that the death penalty be authorized for premeditated murder. *Id.* at 380, 381. Congressional intent that the death penalty exist as a permissible sentence for premeditated murder was in no way thwarted nor invalidated by *Matthews.* We find no holding of any court which has invalidated Article 118 as unconstitutional.

B.

The effect of *Matthews* was to prohibit the imposition of the death penalty until the procedural defect found by the Court was remedied. The Court noted that the action to remedy this defect could either be taken by Congress or the President. *Id.* at 380. Corrective action was taken by the President when R.C.M. 1004 was promulgated as a part of MCM, 1984. The issue is whether this promulgation was legally valid.

Congress has delegated several of its powers with respect to the UCMJ to the President. Article 56, 10 U.S.C. § 856 delegates the power to set maximum punishments for certain courts-martial offenses and Article 36 delegates the power to prescribe rules. Article 36, UCMJ, provides, in pertinent part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases

> arising under this chapter triable in courts-martial. . . may be prescribed by the President by regulations which shall. . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

To determine whether the promulgation of R.C.M. 1004 properly falls within this provision we first look to the Court of Military Appeals discussion in *Matthews*. When indicating that corrective action could be taken by the President in his capacity as Commander-in-Chief under Article II, Section 2, of the Constitution, and pursuant to the power delegated to him by Congress, the Court stated:

> Pursuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes, the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. However, as contemplated by Article 56 of the Uniform Code, 10 U.S.C. § 856, the President prescribes maximum punishments for the various offenses. . . .
>
> The great breadth of the delegation of power to the President by Congress with



> respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases. . . .

*Id.* at 380, 381.

It is certainly clear from this language that the Court believed it was well within the President's power, as delegated to him by Congress, to promulgate these procedures.[4]

The Court's analysis that the sentencing defects were procedural in nature, and thus within the President's power to correct, is consistent with the Supreme Court's holding in *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). In *Dobbert*, the death penalty statute in effect at the time the defendant committed murder was struck down as violative of the holding in *Furman*. Prior to the defendant's trial, however, a new death statute was enacted. The question was whether the changes in the new statute were procedural in nature, thus allowing it to be retroactively applied against the defendant, or substantive, thereby prohibiting retroactive application based on the constitutional prohibition against *ex post facto* laws. *See* U.S. CONST. art. I, § 10.

The original statute provided that a person convicted of a capital offense would be punished by death unless the jury recommended mercy. The revised statute established, *inter alia*, a bifurcated sentencing proceeding, a specific

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[4]The Court of Military Appeals belief that the President has the power to promulgate these procedures is also consistent with the Court's holding in *United States v. Flucas*, 49 C.M.R. 449 (C.M.A. 1975), where the Presidential promulgation of a Manual provision was found to be valid which added the element of knowledge in assault cases where this element was provided as an aggravating factor increasing the maximum permissible punishment.

enumeration of aggravating circumstances, an opportunity to present relevant evidence of mitigating and aggravating circumstances, a test to balance mitigating circumstances against aggravating circumstances and procedures to review any death sentence imposed. In concluding that these changes were procedural and that there was no *ex post facto* violation, the Court stated:

> . . . [t]he change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.

*Dobbert,* 432 U.S. at 293, 294, 97 S.Ct. at 2298, 53 L.Ed.2d at 356.

The Court further supported the conclusion that the change was procedural by quoting from *Hopt v. Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), as follows:

> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.

*Dobbert,* 432 U.S. at 294, 97 S.Ct. at 2298, 2299, 53 L.Ed.2d at 357.

R.C.M. 1004 established capital sentencing provisions which are similar to the statutory changes in *Dobbert.* R.C.M. 1004 sets forth aggravating factors, one or more of which must be found before death may be considered;



provides a notice requirement concerning these factors; provides broad latitude to present evidence in extenuation and mitigation; establishes voting procedures; and provides for necessary findings, including a balancing test, as a prerequisite to adjudging a death sentence. As in *Dobbert,* R.C.M. 1004 simply altered the methods employed in determining whether the death penalty was to be imposed. Thus, we reach the same conclusion as the Court in *Dobbert* as to the nature of these provisions. We find that the changes in the capital sentencing scheme brought about by the provisions of R.C.M. 1004 are clearly procedural.

C.

The next question is whether such a promulgation is contrary to the intent of Congress. We analyze this from two perspectives. First, Article 36(b) requires that the President report to Congress when rules and regulations are made. In accordance with this provision, copies of the Executive Orders promulgating R.C.M. 1004 as a part of MCM, 1984, and the subsequent modification to R.C.M. 1004 were transmitted to Congress. 130 Cong.Rec. H-7611 (daily ed. July 23, 1984) (EC-3679); *id.* S-9217 (daily ed. July 25, 1984) (EC-3579); and 132 Cong.Rec. H-1022 (daily ed. March 11, 1986) (EC-2959); *id.* S-2355 (daily ed. March 10, 1986) (EC-2667). Thereafter, no Congressional objection to R.C.M. 1004 was voiced and, consequently, tacit approval of these procedures can be inferred. Second, and more important, is the Congressional intent reflected in the passage of Public Law 99-145, Title V, § 534(a), Nov. 8, 1985, 99 Stat. 634, which amended the Uniform Code of Military Justice by establishing espionage as a capital offense under Article 106a, UCMJ, 10 U.S.C. § 906a. This article creates certain aggravating factors which the members must unanimously find beyond a reasonable doubt in order to adjudge a sentence of death.

In addition, it provides specific recognition of the President's power to delineate aggravating factors for a capital offense, as follows:

> (4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).

Article 106a(c)(4), UCMJ, 10 U.S.C. § 906a.

Furthermore, in considering the legislative intent associated with this act we note the following:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provisions of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles.

Department of Defense Authorization Act of 1986, Pub.L. No. 99-145, 1985 U.S.Code Cong. & Admin.News pp. 472, 579.

This legislative intent evidences a clear ratification of the Presidential action in promulgating R.C.M. 1004. This, combined with the statutory provision allowing the President to establish aggravating factors and the tacit approval of R.C.M. 1004, convinces us that Congress does not



believe that the President has encroached on its legislative prerogative in this matter.

D.

The only remaining question is whether, in spite of the beliefs of the Court of Military Appeals, the President, and Congress, promulgation of this rule is nevertheless constitutionally flawed because the Congressional delegation of power to the President under Article 36, UCMJ, is violative of the principle of separation of powers.[5] The Supreme Court has long recognized that Congress generally cannot delegate its legislative powers to another branch of Government. *Field v. Clark,* 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294, 310 (1892). Nevertheless, they have recognized that this prohibition does not prevent Congress from acquiring the assistance of other branches. *J.W. Hampton, Jr. & Company v. United States,* 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed. 624, 629 (1928). In *Hampton,* the Court indicated:

> In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination. . . . Congress has found it . . . necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion . . . to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.

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[5]U.S. CONST. art. I, § 1 provides that legislative powers shall be vested in the Congress of the United States.

*Id.* (Citations omitted).

As a result, many Congressional delegations of power have been upheld. *See, e.g., Mistretta v. United States,* ___ U.S. ___, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (upholding delegation to the United States Sentencing Commission of the power to promulgate binding sentencing guidelines for federal offenses); *Lichter v. United States,* 334 U.S. 742, 785-786, 68 S.Ct. 1294, 1316-1317, 92 L.Ed. 1694, 1725-1726 (1948) (upholding delegation to Secretary of War and other administrative officials of the authority to determine excessive profits); *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 600, 64 S.Ct. 281, 287, 88 L.Ed. 333, 344 (1944) (upholding delegation of authority to Federal Power Commission to determine just and reasonable rates).

The Supreme Court has upheld Congressional delegation of authority where it "is sufficiently specific and detailed to meet constitutional requirements", *Mistretta,* ___ *U.S. at* ___, 109 S.Ct. at 655, and where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. SEC,* 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103, 116 (1946). In her dissent, Judge Albertson argues that Article 36, UCMJ, fails to meet these requirements, particularly as to establishing specific standards to prevent the President from acting arbitrarily. We do not agree.

Article 36, UCMJ, delineates the general policy to prescribe pretrial, trial, and post-trial procedures for cases tried by courts-martial. It states that the authority is delegated to the President, and, most importantly, it *does* establish specific boundaries to limit the President's action under this provision. The President, in prescribing these



procedures, is bound to apply the principles of law recognized in criminal trials in the United States district courts. Consequently, he does not have unfettered discretion to do as he pleases. Rather, he may not act arbitrarily and he must follow the law. He is subject to an additional check in that he must report all rules and regulations made under this article to the Congress.

The President's action in promulgating R.C.M. 1004 falls squarely within the specific and detailed boundaries of his authority. R.C.M. 1004 complies not only with the legal principles of the United States district courts, but also with those of the United States Supreme Court. *See Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). We find no defect, constitutional or otherwise, in the promulgation of this rule.

## IV

## Equal Protection

Appellant alleges that he has been denied his right to the equal protection of the law and to be free from cruel and unusual punishment because as a member of the armed forces he has been sentenced to death when this punishment is not available for murder tried in federal civilian courts. The appellant's assertion that his rights under the Fifth and Eighth Amendments have been violated by Congress' decision to make the death penalty available for violations of Article 118, UCMJ, and the President's promulgation of the procedures in R.C.M. 1004, MCM,

1984, for the imposition of the death penalty, is without merit.[6]

The Court of Military Appeals has held that not every distinction or varied treatment of military personnel made by the Government violates equal protection guarantees of the Constitution. *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981). It is only when the distinction or treatment becomes unjustifiable discrimination that a service member's due process rights to the equal protection of the laws are implicated. *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1958); *United States v. Larner*, 1 M.J. 371, 375 (C.M.A. 1976). In order to determine when a distinction or treatment is justifiable it is necessary to first examine whether the Government has utilized constitutionally suspect classifications such as race, religion, or national origin, or whether the Government is encroaching on fundamental constitutional rights. If neither suspect classifications nor fundamental constitutional rights are involved, then the Government's varied treatment of service members need only have a reasonable or rational basis. *Means*, 10 M.J. at 165.

Appellant has alleged that his fundamental right to life is encroached by the Government's decision to make the death penalty a permissible sentence for service members and, therefore, a higher standard of scrutiny should be utilized than the rational basis test for determining whether he has been denied equal protection of the law. This

[6]The Eighth Amendment is violated when the death penalty is carried out in barbaric or inhumane method or if it is excessive in relation to the crime committed. *See Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982). Since the appellant has not factually developed the method in which naval personnel are to be executed and since the question of whether the death penalty is proportionate to appellant's crime is fully discussed in section VIII, we will analyze this allegation of error pursuant to the due process clause of the Fifth Amendment.



particular issue is of first impression in military law and we will look to federal case law for precedent. The Fifth Circuit Court of Appeals has twice examined this exact issue. In *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983), the Court held that the presence of a death penalty in a criminal statute does not encroach on a fundamental right so as to trigger a heightened level of scrutiny. The Fifth Circuit based its decision on the Supreme Court's reasoning in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In *Gregg*, the Supreme Court reasoned that because of the complex issues involved in determining the moral values of society and the social utility of the death penalty, it is particularly within the province of the legislature to establish the degree of punishment for certain classes of crimes. Therefore, the Court reasoned that the decision to authorize the death penalty for certain classes of crimes should not be upset by the courts unless it is "clearly wrong." *See Gregg*, 428 U.S. at 186-188, 96 S.Ct. at 2931, 49 L.Ed.2d at 882. Accordingly, it was held in *Gray v. Lucas* that equal protection challenges to a death penalty scheme should be analyzed under a rational basis test, and not the heightened level of scrutiny which appellant urges. This holding was later reaffirmed in *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir. 1987), *cert. denied*, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987).

The legal reasoning in *Gray v. Lucas* and *Williams v. Lynaugh* is sound and we will, therefore, analyze appellant's equal protection challenge to R.C.M. 1004, MCM, 1984, according to the rational or reasonable basis test. *But cf. Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (the punishment of sterilization was held to encroach upon the fundamental right of procreation).

Congress had a rational basis for deciding to authorize the death penalty for a violation of Article 118 and to delegate to the President the task of promulgating the procedures to impose this punishment on service members. Service members, because of their mission to wage war, may need the more stringent deterrent of capital punishment to ensure discipline. It is the necessity to secure from service members "prompt obedience to lawful orders and the maintenance of the orderliness and self-discipline necessary to the effective operation and control of an armed force in combat" that precipitated the establishment of the UCMJ as a disciplinary system. *United States v. Van Steenwyk,* 21 M.J. 795, 801 (NMCMR 1985). It is because "the military is by necessity, a specialized society separate from civilian society" that civilian definitions of "criminal law" cannot be applied to establish the parameters necessary to maintain military discipline. *Parker v. Levy,* 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439, 450 (1974). Therefore, it is reasonable for Congress to ensure military discipline by providing a heightened punishment for a breach of military criminal law than would be authorized for similar breaches of federal civilian criminal law.

It is also reasonable for Congress to address the potential fears that the civilian community may have towards maintaining a professional and permanent fighting force by authorizing death for certain heinous crimes, such as murder. Clearly, a rational basis exists for the federal Government to distinguish civilians convicted of murder from federally trained and government sponsored military members convicted of murder and to legislate a different form of punishment for these two classes of criminals. Thus, we find the appellant's equal protection challenge to the punishment of death for a violation of Article 118 and to the procedures as set forth in R.C.M. 1004 to be without merit.



## V

## Challenge For Cause

After lengthy *voir dire,* one of the prospective members, Captain Emerson, was challenged for cause by the Government. The Government based its challenge on the case of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), arguing that because of his religious upbringing and beliefs, Captain Emerson could never, under any circumstance, vote to impose the death penalty. The military judge granted the Government's challenge for cause, stating:

> I believe that he would not have any difficulty in voting for a finding of guilty which would automatically result in a penalty of death. But in this case I think it is clear to the military judge that he does have an inelastic attitude as described for—to voting in *U.S. v. Rojas,* [15 MJ. 902 (NMMR 1983)] and although he used the words that he would consider, I don't think that that consideration would be a meaningful one anyway, and that, notwithstanding his sincerity, he would be compelled to vote for the alternate punishment.

Appellant asserts that the military judge erred in granting this challenge for cause. He contends that the military judge's reliance on *Witherspoon* and *United States v. Rojas,* 15 M.J. 902 (NMCMR 1983), was misplaced and that a new standard exists which would not have excluded Captain Emerson. Appellant is correct to the extent that the standard applicable to this challenge is the one set forth in *Adams v. Texas,* 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d

581 (1980). However, we find that the military judge considered *Adams* in making his ruling and that Captain Emerson's views concerning capital punishment permitted his challenge under this standard. Thus, appellant's contention is without merit.

In *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court reaffirmed that *Adams v. Texas* established the proper standard for determining when prospective jurors may be excluded for cause because of their views on capital punishment.[7] *Adams* permits a juror to be challenged for cause when his views about capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Wainwright,* 469 U.S. at 423, 105 S.Ct. at 851, 83 L.Ed.2d at 851. This standard abolishes the *Witherspoon* reference to "automatically" voting against the death penalty, thereby dispensing with the requirement that a juror could only be excluded if he would never vote for death. In addition, it eliminates the extremely high burden of proving that a juror's bias is "unambiguous" or "unmistakably clear". *Id.* 469 U.S. at 423, 424, 105 S.Ct. at 851, 852, 83 L.Ed.2d at 851, 852.

In applying this standard in *Wainwright,* the Supreme Court upheld the trial judge's excusal for cause of a juror who stated that her beliefs concerning the death penalty would interfere with her sitting as a juror. In so finding, the court gave great deference to the trial judge's findings as long as the findings were fairly supported by the record regardless of whether a reviewing court might disagree with these findings. The Court noted:

[7]In reaffirming this standard, the Court noted that the genesis for excusing jurors in capital cases was to prevent the state's legitimate interest in administering constitutional capital sentencing schemes from being frustrated. *Wainwright,* 469 U.S. at 423, 105 S.Ct. at 851, 83 L.Ed.2d at 851.



> . . . determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 434, 105 S.Ct. at 857, 83 L.Ed.2d at 858, citing *Marshall v. Lonberger,* 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

The Supreme Court similarly applied the *Adams* standard in *Lockhart v. McCree,* 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and upheld the removal of eight jurors for cause prior to the guilt phase of a bifurcated trial. In that case, the trial judge removed for cause eight of the jurors who stated that they could not under any circumstance vote for the imposition of the death penalty.

In this case, Captain Emerson was thoroughly questioned by both counsel and the military judge. He indicated that he had definite reservations concerning the death penalty. These reservations were founded on his religious teachings

and belief that only God could take a life. Captain Emerson appeared to be quite ambivalent during the initial portion of the *voir dire* as to how his beliefs might affect his ability to sit as a member and adjudge a sentence.[8] Subsequently, however, his feelings became much more focused, particularly after he realized that he had another option available during sentencing other than death:

> DC: Well, I'm a little confused because it seems to me that you're saying two things at the same time. Are you saying that it's your religious belief that it's an extremely difficult thing to do, to vote for a death penalty?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> DC: And at the same time you're saying that, yes, because of my obligation as a military officer, I could consider it and I could do it?
>
> MEM(CAPT EMERSON): I could consider it, but once again I stated that if there is another option that I would probably sway towards the other option.

R. 167, 168.

> TC: So you, under no circumstances, because of your religious beliefs could vote for a penalty of death regardless of the facts and circumstances of the case?
>
> MEM(CAPT EMERSON): Yes, sir.

[8]It is clear from the record that Captain Emerson's religious beliefs would not have interfered with his ability to determine guilt or innocence during the findings phase of the trial.



> TC: You could consider it, but you could not vote for it?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: Because of your religious beliefs?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: And that's the truth from the bottom of your heart, is it not?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: Captain Emerson?
>
> MEM(CAPT EMERSON): When he asked me do I consider it, I said "I'd consider it." But once again, I will always go with the other option.

R. 169.

> MJ: Now considering the prefatory remarks of Major Boyett, we got to the point in which you were called upon to cast your vote either for the death penalty or for the other alternative punishment. Do I correctly understand that you would in all events cast your vote for the alternative punishment?
>
> MEM(CAPT EMERSON): Yes, sir.

R. 173.

The foregoing testimony clearly illustrates that Captain Emerson's beliefs would affect his ability to adjudicate a

sentence in that he would always choose an alternative other than death even though he would "consider" death. We agree with the military judge that this "consideration" would not be a meaningful one.

We must now examine Captain Emerson's responses in light of the *Adams* test to determine whether his exclusion for cause was proper. We initially note that, contrary to appellant's assertion, the military judge did not rely solely on *Witherspoon* and *Rojas* in ruling on this challenge. In fact, following a recess toward the end of *voir dire*, he compared Captain Emerson's responses specifically with the *Adams* and *Lockhart* cases.

We give deference to the military judge's determination of Captain Emerson's views based on his personal observation of Captain Emerson and conclude that it is fairly supported by the record. We find that if Captain Emerson had been allowed to serve as a member in this case he would have effectively frustrated the Government's legitimate interest in administering its constitutionally valid death penalty scheme by always voting for an option other than death regardless of the circumstances. We find that Captain Emerson's views would have prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath. The excusal of Captain Emerson for cause was proper.

## VI

### Denial of Right to a Panel of Fair and Impartial Members

Appellant made a motion for appropriate relief at trial asserting that his Sixth Amendment right to an impartial jury had been violated in that the members selected by the



convening authority did not represent a cross section of the community. This same issue is raised on appeal and, in addition, appellant contends that even if the Sixth Amendment is inapplicable to courts-martial, he nevertheless was denied his due process right to be tried by members with fair and open minds whose impartiality could not be reasonably questioned. We find no merit to either contention.

In support of his motion, appellant called a clinical psychologist to testify. The witness was qualified as an expert in behavioral psychology. As to foundational matters, the psychologist testified that he was aware of the fact that appellant was alleged to have murdered a Marine officer and his wife, that he had reviewed the convening orders and modifications, and was aware of the composition of the prospective membership of the court. The psychologist testified that he was concerned that the officer members would not be totally impartial and objective because of their higher likelihood of identifying with the victim, who was also an officer. He proposed that the situation could be remedied by selecting the prospective members at random. No inquiry was made of the psychologist as to the ability of an officer chosen at random to be impartial and objective. Subsequently, the members were extensively questioned in *voir dire* and, as appellate defense counsel concedes in his brief, the officer members who ultimately decided the case gave no specific responses during *voir dire* which indicated any inability to be impartial. It is also significant to note that the assistant defense counsel acknowledged to the military judge that there was no indication that the convening authority had failed to comply with Article 25, UCMJ, 10 U.S.C. § 825.[9]

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[9]This is uncontested on appeal.

Congress has specifically prescribed in Article 25, UCMJ, the qualifications for service as a member of a courts-martial. It provides in pertinent part:

> [T]he convening authority shall detail as members thereof such members as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

The Court of Military Appeals has noted on several occasions that the Sixth Amendment right to a jury composed of a representative cross section of the population does not apply to courts-martial and, in fact, Article 25 contemplates otherwise. *See United States v. Santiago-Davila,* 26 M.J. 380 (C.M.A. 1988); *United States v. McClain,* 22 M.J. 124 (C.M.A. 1986).

We consider unpersuasive the appellant's argument that the testimony of his expert, standing alone, was sufficient to dismiss the members.

The record contains nothing at all to support appellant's conclusion. The expert testified in advance of *voir dire* and expressed a "concern" that the officer members might identify with the victim and therefore be partial. This "concern" was wholly unsubstantiated by specific responses of prospective officer members during *voir dire.* While the expert had testified in numerous trials, he admitted that this was the first time he had expressed an opinion on this particular issue. Finally, his remedy to resolve the situation—to randomly select members from the command—leaves open the distinct possibility that the officers chosen in this manner might have the same inclination to identify with the victim. His remedy in no



way seeks to exclude officers entirely from the panel[10] which would logically resolve his concern, but merely offers an alternative method for selecting prospective members than is set forth in Article 25. The proposed remedy is inconsistent with the psychologist's own opinion and detracts from its validity. We find nothing to support the allegation that the officer members might not be impartial. To the contrary, the record is replete with assurances by the members that they would follow the law and give appellant a fair trial. The military judge correctly denied this motion for appropriate relief.

## VII

## Peremptory Challenge

At the conclusion of *voir dire,* Government counsel peremptorily challenged Staff Sergeant Edwards, a black, who is of the same racial group as appellant. Defense counsel objected on the basis that the peremptory challenge was used in a discriminatory manner, but the objection was ultimately overruled by the military judge. Appellant contends that the military judge erred in this ruling, thereby denying his right to equal protection of the law.

The Supreme Court has held that a defendant has the right to be tried by a jury from which no "cognizable racial group has been excluded" and, thus, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black

[10]While an accused is not entitled to a panel composed of entirely enlisted personnel, Article 25 does not preclude such a result. It merely requires that *at least* one-third of the members be enlisted when the accused has made a request for enlisted members.

defendant." *Batson v. Kentucky*, 476 U.S. 79 at 89, 106 S.Ct. 1712 at 1719, 90 L.Ed.2d 69 at 83 (1986). This right to equal protection is part of due process under the Fifth Amendment and applies to trials by Courts-Martial. *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988). *See also United States v. Shelby*, 26 M.J. 921 (NMCMR 1988).

*Batson* provides that once the defendant makes a prima facie showing of purposeful discrimination in the Government's use of the peremptory challenge, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. A prima facie case is established when the defendant shows that he is a member of a cognizable racial group; that the prosecutor exercised peremptory challenges to remove members of defendant's racial group; and, that these facts and any other relevant circumstances raise an inference that the use of these challenges was to purposely exclude jurors because of race. This inference is based on the totality of the circumstances and such things as a "pattern" of strikes of members of a racial group or the prosecutor's questions and statements during *voir dire*, may be considered. *Batson*, 476 U.S. at 96, 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88.

It is insufficient to rebut the prima facie case by a mere assertion of the prosecutor that he was properly performing his duties and had no discriminatory motive for his challenge. It is not, however, necessary for the neutral explanation to rise to the level that would justify a challenge for cause. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1722, 1723, 90 L.Ed.2d at 88. In *Batson*, the case was remanded because the prosecutor used his peremptory challenges to remove all four black persons on the venire which resulted in the defendant, also black, being tried by an all white jury.



In *Santiago-Davila*, the accused was of Hispanic descent and the court members selected by the convening authority consisted of ten officer and enlisted members, two of whom had Hispanic surnames. Following *voir dire*, the Government peremptorily challenged one of the Hispanics and the military judge allowed the challenge to stand in spite of the objection by defense counsel. The military judge offered trial counsel an opportunity to state a reason for the challenge but trial counsel declined to do so and the military judge did not require that a reason be given. In remanding *Santiago-Davila*, the Court of Military Appeals found that a prima facie case of purposeful discrimination had been established which required that a neutral explanation be given. The Court was not persuaded by the fact that one Hispanic remained on the panel, and it was of particular importance that they found an absence of anything in the *voir dire* or anywhere else in the record to clearly indicate anything other than race as a motive for the challenge. *Santiago-Davila*, 26 M.J. at 391.

Turning to the case *sub judice*, the court selected by the convening authority consisted of nine officers and six enlisted members. Of these, six were black. One black officer was successfully challenged for cause by the defense because he knew Lieutenant Lotz and was Lotz's superior in the chain of command. Another black officer, Captain Emerson, was also challenged for cause by the Government for the reasons discussed in a prior assignment of error. The Government further successfully challenged for cause a white officer without objection and the defense similarly challenged for cause two more white officers. Thus, at the time the Government exercised its peremptory challenge against Staff Sergeant Edwards, the panel consisted of four officers and six enlisted persons, four of whom were black. The final racial composition of the court was six whites and three blacks (one officer and two enlisted).

During *voir dire,* trial counsel initially experienced some difficulty in ascertaining that Staff Sergeant Edwards understood the concept of the government's burden to establish guilt beyond a reasonable doubt and required assistance by the military judge in defining terms. Thereafter, the *voir dire* appeared to proceed smoothly without revealing anything of particular significance until the following relevant exchange occurred:

> TC: I'll just ask one general question, Staff Sergeant. How do you feel about, again, being—sitting here as a member in this case? Your own words.
>
> MEM(SSGT EDWARDS): I feel, sir, basically that it would be to me a learning experience. And coming in with an open mind, being able to give everything, weighing out everything, and listening to all the facts before I finally say whether a person is innocent or guilty, it would be a good experience for me and something that I would like to go through, sir.
>
> TC: You'd also agree that not—it's not only would be a learning experience, it would be a very, very serious responsibility?
>
> MEM(SSGT EDWARDS): Yes, sir.
>
> TC: Possibly one of the more serious responsibilities in your whole life?
>
> MEM(SSGT EDWARDS): Yes, sir.

This concluded the *voir dire* of Staff Sergeant Edwards and he was subsequently peremptorily challenged by the



Government. Defense counsel made a timely objection and requested that the government state the reason for the challenge. At the time, because *Santiago-Davila* had not yet been decided, the military judge and counsel recessed and considered the ruling in *Batson.* Thereafter, the military judge and trial counsel believed it would be best for trial counsel to state the reason for his challenge. There was no discussion or finding as to whether a prima facie case of purposeful discrimination had been established. The defense counsel expressed his concern as follows:

> DC: Now, it strikes the defense that the government has known for some three and a half months that this case involved a defense theory which potentially would involve racial prejudice. As I remember the answers of Staff Sergeant Edwards, he met all legal criteria to be a member. No one had any objection to him for cause or anything like that. And it strikes the defense as rather strange at this particular point in time that the government is using its one peremptory challenge to take a black man off this jury. Of course, there's nothing that I can point to which proves that it's racially motivated in any particular form, fashion, or manner because I can't look in the minds of the prosecution. But it essentially gives a bad flavor to the whole thing and it's the position of the defense that we should not only be worried about actual fact, but impression and how it looks as well because the court is, after all, essentially, an instrument which is supposed to arrive at fairness.

The military judge discussed the challenges of the other blacks from the panel.

MJ: Well, of course, there were—I think at least two black members that were excused by challenges for cause, but neither one of those had any racial foundation; is that correct?

DC: Yes, sir.

After further discussion concerning specific rationale for these challenges, trial counsel stated his reason for challenging Staff Sergeant Edwards.

TC: My articulation, sir, is, first of all, in my opinion Staff Sergeant Edwards' responses to the voir dire, while satisfactory, didn't indicate to me to be the kind of member that the government would want on this case and one thing particularly that he said, if I remember correctly, he said that he would consider this as a learning experience which, in the Government's opinion, that was not the—while not challengeable for cause, that is why the government chose to exercise its peremptory challenge on him.

Appellant contends that this is not the neutral basis for challenge required by *Batson*. The Government asserts that trial counsel's explanation indicated that the purpose for the challenge was race-neutral assuming *arguendo* that a prima facie case of discrimination had been shown.

In deciding this issue we will initially analyze whether there was a prima facie showing of purposeful discrimination in connection with the peremptory challenge of Staff



Sergeant Edwards. First, appellant is a member of a cognizable racial group and, second, the Government's peremptory challenge sought to remove a member of that group. The only remaining question is whether the totality of the circumstances raise an inference that the challenge was used to exclude this member solely because of race.

Examining the pattern of challenges exercised by trial counsel, we note that challenges for cause were exercised against one white and one black officer. The black officer was challenged because of his beliefs regarding capital punishment. In fact, defense counsel agreed with the military judge that this challenge had no racial foundation. Appellate defense counsel further concedes that he can point to nothing which proves the challenge was racially motivated. Our review of the record likewise reveals nothing said by trial counsel during *voir dire* that would infer the challenge was racially motivated. Our determination of this question is hampered by the fact that the military judge made no findings with respect to this prima facie showing either because he simply neglected this step in applying the *Batson* principles or because he believed there was an automatic inference of purposeful exclusion merely because of the defense theory involving racial prejudice or for some other reason. Without speculating further, we will exercise caution and follow the Court of Military Appeals in their belief that the trial judge is able to decide if all of the circumstances surrounding the challenge create a prima facie case. *Santiago-Davila*, 26 M.J. at 392.

Finally, we must analyze whether trial counsel's explanation was neutral. Trial counsel stated that Staff Sergeant Edwards was not the kind of member the Government wanted on the case because he stated he would use it as a

learning exprience.[11] In response to this explanation the military judge indicated that this was the only thing he had written down with respect to Staff Sergeant Edwards. He noted that it was probably an unfortunate choice of words but it nevertheless caught his attention. The military judge, in denying the defense's objection and thus sustaining the peremptory challenge, found that, while he might not agree with the Government's stated reason, it was understandable and had sufficient foundation to satisfy *Batson*. We agree with the military judge.

Trial counsel's questioning during the entire *voir dire* reflected the fact that he wanted the court to consist of members who were aware of the serious responsibility of deciding a capital case and who were capable of carrying out that responsibility. We believe that trial counsel sensed something less than these qualities in Staff Sergeant Edwards and felt that a case with the serious consequences of this one should not be used as a "learning experience". We find this explanation to be totally devoid of any racial motivation and to be completely neutral.

## VIII

## Appropriateness of the Sentence to Death

Finally, we consider the appropriateness of appellant's sentence to death. Appellant contends that he should not be put to death because his murder of the Lotzs was simply a reaction to the way he had been treated by Lieutenant

[11] There may have been other factors of concern to trial counsel such as the difficulty he encountered in explaining to Staff Sergeant Edwards the concept of the Government's burden to prove guilt beyond a reasonable doubt. We will not speculate, however, as to what "other" factors may have influenced trial counsel to exercise this challenge and we have confined our analysis solely to the reason stated in the record.



Lotz. He also contends that no proper penal interest would be served by such a sentence. He argues that these factors militate against imposition of the death penalty in this case. Chief Judge Byrne in his dissent, cites the "racial stereotyping of appellant by Lieutenant Lotz",[12] as well as the lack of recent precedent for executions in the Naval Service, as reasons for opposing the death penalty in this case. We do not agree with this reasoning.

We begin our analysis of this issue by carefully considering Lieutenant Lotz's relationship with his subordinates and the atmosphere that existed in the supply office. Lieutenant Lotz referred to his subordinates by nicknames, either nicknames he coined himself or those invented by others. A Marine of Peruvian descent was called "a fuzzy headed foreigner"; others had names such as "tomahawk", "red", and "Jonesy". Lotz's use of nicknames was not confined to persons in his office and he called a black Marine officer friend, "Action Jackson". Several nicknames were used with respect to appellant—"Bebop Curtis" and "Curtis Blow" (apparently in reference to a black "rap" singer). In addition to the use of nicknames, Lotz allowed music to be played in the work spaces, and this was often "rap" music. While listening to this music, Lotz, on occasion, imitated what he thought were black mannerisms. The atmosphere was described by some as joking and casual.

Following a supply inspection, Lotz was criticized by the inspector for calling his subordinates nicknames and was told that this practice was unprofessional. Thereafter,

[12] In support of this reason, Chief Judge Byrne states that racial prejudice in sentencing was an underlying rationale for striking down the death penalty in *Furman*. Such rationale is inapposite to this case since in *Furman* the racial prejudice under consideration was that of the jury against the defendant rather than any prejudice by the victim against the accused as alleged in this case.

Lotz called the office personnel together and inquired as to whether the use of nicknames was offensive to anyone. No one present, including Curtis, voiced an objection to this practice and the use of nicknames continued.

Appellant testified that he was nevertheless bothered by these nicknames and by Lotz snapping his fingers at him, calling his mother by her first name and criticizing him for a bad attitude. Appellant acknowledged on cross-examination that his proficiency and conduct marks had improved under Lotz and that Lotz was training him for a job of increased responsibility within the office. Co-workers characterized the occasional criticism of Curtis as justified because Curtis was a slow worker and was sometimes lazy. Appellant asserts that Lotz's actions, as a whole, were offensive to him and that he perceived Lotz to be racially prejudiced.[13]

It is apparent that Lieutenant Lotz was insensitive to the feelings of minorities and to the potential effect of his conduct in this regard. Additionally, it is apparent that Lieutenant Lotz made the mistake which some junior,

[13]We are unable to determine whether or not Lieutenant Lotz was, in fact, racially prejudiced. We note, however, that substantial evidence was admitted that Lotz was neither racially prejudiced nor acted in a discriminatory manner. For example, two black sergeants and a black staff sergeant who worked in the supply office testified that they did not believe that Lotz was racially prejudiced. They did not preceive "racial tension" in the office nor did they believe that the use of nicknames and imitations by Lotz were done in a racially derogatory fashion. The Company First Sergeant, also a black Marine, testified that during his twenty-five years of active duty he had seen racial prejudice; however, after knowing Lieutenant Lotz for two years, it was his opinion that Lotz was not prejudiced against black Marines. First Lieutenant Jackson, a black officer, knew Lotz well for almost eight months and testified that there was no question in his mind that Lotz was not prejudiced. Finally, a young black civilian testified that he lived with Lieutenant and Mrs. Lotz for about three months while he assisted Mrs. Lotz in coaching a basketball team at the school where she taught. He was treated as a member of the family in almost a "parental relationship".



relatively inexperienced officers make of creating an overly familiar, informal atmosphere with his subordinates in an attempt to be accepted. This is not a proper or professional relationship between officers and enlisted personnel. The question, however, is whether Curtis should now be exempt from the death penalty because of the flawed leadership style of Lieutenant Lotz?

This question can be phrased in another manner: whether one who is dissatisfied with what he perceives to be the improper actions of his superior should escape the most severe punishment for murdering that superior? We believe that it is contrary to the interests of society to mandate a lesser punishment for such a crime and still expect that such crimes will be deterred in the future. This is particularly true in a military environment where the very cornerstone of our system of discipline is the superior-subordinate relationship. To allow, or even suggest, that one should be less severely punished because of a "perception of maltreatment" by a superior would tear at the very fiber of our military system of discipline. We reject the notion that the death penalty is inappropriate under the circumstances of this case based on Curtis' perception of his relationship with Lieutenant Lotz.

Even if we were to believe that appellant's perception of mistreatment by Lotz somehow militated against the death penalty for killing Lieutenant Lotz, it is inexplicable why this in any way lessens his culpability for the brutal slaying of Mrs. Lotz. Curtis savagely stabbed Joan Lotz seven times as she begged for him to stop and then indecently assaulted her as she lay dying. Curtis admitted that Joan Lotz never did anything to hurt him.

We next address the argument that the death sentence is inappropriate simply because it has not been imposed in

the Naval Service in recent history. This fact alone is not dispositive of the issue. As previously discussed in Section III, Congressional intent that death be a sentencing option for premeditated murder remains viable today. In addition, while no death sentences have been carried out in the recent past, the military community has recently expressed its intent that death is the appropriate sentence for premeditated murder under certain circumstances by adjudging death at the courts-martial level. *See United States v. Turner,* No. 85-4044 (NMCMR 8 August 1986), *rev'd,* 25 M.J. 324 (C.M.A. 1987), *aff'd,* No. 85-4044R (NMCMR 31 October 1988) (convening authority commuted death sentence to life imprisonment); *United States v. Rojas,* 15 M.J. 902 (NMCMR 1983) *rev'd in part,* 17 M.J. 154 (NMCMR 1981) (death sentence reversed for constitutional procedural infirmity, not for inappropriateness); *United States v. Hutchinson,* 15 M.J. 1056 (NMCMR 1983), *rev'd in part,* 18 M.J. 281 (C.M.A. 1984) (summary disposition) (death sentence reversed for constitutional procedural infirmity, not for inappropriateness). We find these expressions of intent to be persuasive and discount any bar to approving the death sentence based on when the last time such a sentence was carried out.

Lastly, we address the contention that death serves no penal interest. The death penalty serves two social purposes: deterrence and retribution. *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-2930, 49 L.Ed.2d 859, 880. Appellant argues that deterrence can be accomplished with a life sentence and that retribution is irrational and has no place in the military justice system. We reject this argument.

As we previously noted, deterring serious criminal misconduct is of particular importance in the military because our ability to fulfill our mission is directly related



to the discipline of our forces. In order for deterrence to be effective, we believe the full range of punishments for a particular offense ought to be available and that the punishment should be tailored to the individual and the circumstances of the offense.

Contrary to appellant's assertion, retribution has a place in our system of justice. In *Gregg,* Justice Stewart, in discussing retribution noted:

> [C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

*Id.* 428 U.S. at 183, 96 S.Ct. at 2930, 49 L.Ed.2d at 880.

Justice Stewart further noted in *Gregg* a speech on capital punishment given by Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, in which it was stated:

> The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.

Royal Commission on Capital Punishment, minutes of Evidence, Dec. 1, 1949, p. 207 (1950).

In this case, we view the crimes committed by Curtis to be heinous and outrageous. The slaying of Lieutenant Lotz,

Curtis' officer-in-charge, and Mrs. Lotz in their quarters aboard a military base and the manner in which these killings were accomplished convinces us that the death sentence is clearly proper. We do not arrive at this conclusion lightly and have carefully considered all of the circumstances surrounding the offenses and all evidence of extenuation and mitigation. Taking all of these factors into consideration, we find the sentence to death to be appropriate in this case.

## IX

## Decision

We have carefully examined the record of trial, the clemency request, the assignments of error and the Government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. We are convinced of appellant's guilt of all of the charges and specifications beyond a reasonable doubt and specifically find the sentence to be appropriate. Article 66(c), Uniform Code of Military Justice.

Accordingly, the findings and sentence, as approved on review below, are affirmed.

Senior Judges COUGHLIN and RILEY, and Judges McLERAN, MIELCZARSKI, JONES and RUBENS concur.

BYRNE, Chief Judge (concurring/dissenting):

I believe life imprisonment, not death, is the appropriate penalty in this case.

The racial stereotyping, by one of the two murder victims, precipitated appellant's violent acts. *See, e.g.*, R. 591, 602-605.



This fact is vital because a matrix of contexts circumscribes when the death penalty is appropriate in the Naval Service. A Marine has not been executed since 1817.[1] There are strong religious and moral factors weighing against imposition of this ultimate sanction. Concern with racial prejudice in sentencing underlies the Supreme Court's rationale in *Furman v. Georgia*.[2] The Supreme Court has fenced in the death penalty with unique constraints limiting its imposition—in contrast to other lawful, imposable punishments.[3] Consequently, before any system

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[1] Solis, LCOL Gary D., *Marines and Military Law In Vietnam: Trial by Fire* (Working Draft) History and Museums Division, Headquarters, U.S. Marine Corps.

[2] *See e.g., Furman v. Georgia*, 408 U.S. 238, 251-53, 363-367, 92 S.Ct. 2726, 2732-33, 2763, 2789-91, 33. L.Ed.2d 346, 355-57, 390, 420-22.

[3] In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), Justice Stewart stated:

> While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which 0it is not." 408 US, at 313, 33 L.Ed.2d 346, 92 S.Ct. 2726 (concurring). Indeed the death sentences examined by the Court in Furman were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in Furman were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so

of criminal justice in this land executes the death penalty, its rationale for doing so must be capable of withstanding withering scrutiny.[4] The crimes committed by the accused must "cry out" for death. The racial overtones in this case have silenced that cry, in my opinion.

I would affirm only so much of the sentence as provides for confinement for life, total forfeitures, a dishonorable discharge, and reduction to pay grade E-1.

In all other respects, I concur with Judge Strickland's opinion.

ALBERTSON, Judge (concurring in part/dissenting in part):

I concur with the majority on their resolution of all issues except those discussed in section's three and eight of the

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freakishly imposed." Id. [408 U.S.] at 309-310, 33 L.Ed.2d 346, 92 S.Ct 2726. (Stewart, J., concurring).

428 U.S. at 188, 96 S.Ct. at 2932, 49 L.Ed.2d at 883.

Later, Justice Stewart concluded:

> In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

428 U.S. at 195, 96 S.Ct. at 2935, 49 L.Ed.2d at 887.

[4]Professor of Law George E. Dix commented in a Georgetown Law Journal article regarding appellate review of death sentences:

> Such a review implicitly includes an evaluation of whether reasonable persons would regard the death sentence as disproportionate to the offender's culpability, given the nature of the crime committed, the circumstances of its commission, and possible influences upon the defendent.

PIX, George E., "Appellate Review of the Decision To Impose Death," 68 Geo.L.J. 93 107.



majority opinion. I dissent from their resolution of the assignment of error relating to the Presidential authority to promulgate Rule for Court-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), 1984, because I have concluded that, until Congress acts in an affirmative manner, the Article 118, Uniform Code of Military Justice (UCMJ), provision authorizing the imposition of the death penalty is constitutionally invalid as a result of the Supreme Court's decision in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Even if I am incorrect in that conclusion, I further conclude that the delegation of authority by the Congress to the President to promulgate R.C.M. 1004(c) was absolutely impermissible and as presently set forth in Article 36, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836, does not include sufficient standards to guide the President, in accordance with the principles set forth in *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), to promulgate R.C.M. 1004(c).

R.C.M. 1004 enunciates the only procedures and aggravating factors within the military justice system (except for Article 106a, UCMJ) for determining the appropriateness of the imposition of the death penalty. R.C.M. 1004 was promulgated in light of the suggestion of the United States Court of Military Appeals decision in *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983) which in turn was based upon the United States Supreme Court decision in *Furman v. Georgia.* Thus, I do not contest the finding of my Brothers in the majority that the procedures set forth in R.C.M. 1004(a), (b), (d), and (e) meet the requirements the Supreme Court mandated before imposition of the death penalty could be considered constitutional. I believe, however, that the only Governmental authority that can identify, at least as they relate to aggravating factors, (*i.e.,* R.C.M. 1004(c)) and effectuate the standards for imposition of the death penalty

in accordance with the Supreme Court's mandate within the military justice system, as it is presently established, is the United States Congress. While Congress might be able to delegate the *Furman* mandate, it can only do so after meeting certain criteria, *United States v. Mistretta,* ___ U.S. ___, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) citing *American Power and Light Co. v. SEC,* 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946),[1] which, at this point in time, it has not met. Accordingly, I find that the imposition of the death penalty upon a military accused convicted within the military justice system is unconstitutional under the principles announced in *Furman v. Georgia,* (hereinafter *Furman*) and *United States v. Mistretta.* I shall explain in more detail below. With regard to the eighth assignment of error, the appropriateness of the imposition of the death penalty in appellant's case, I dissent only because I cannot reach a consideration of that issue since I am not convinced that the death penalty is a valid punishment or that the guidelines set forth in R.C.M. 1004(c) are authorized and appropriate guidelines.

## I.

### *Furman v. Georgia*

*Furman* declared that existing state capital punishment statutes violated the Eighth Amendment because they

[1] As quoted in the recent Supreme Court decision of *Mistretta v. United States,* ___ U.S. ___, ___, 109 S.Ct. 647, 652-54, 102 L.Ed.2d 714 (1989); "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its functions.' *Panama Refining Co. v. Ryan,* 293 U.S. 388, 421, 55 S.Ct. 241, 248, 79 L.Ed. 446 (1935). Accordingly, this Court has deemed it 'constitutionally sufficient' if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power and Light Co. v. SEC,* 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946).



permitted exercise of uncontrolled discretion by sentencing authorities in determining whether to impose capital punishment in any specific case. *United States v. Matthews,* 16 M.J. at 369. Subsequently in *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. at 2920, 49 L.Ed.2d at 859 (1976) (hereinafter *Gregg*), the Supreme Court examined the new (post-*Furman*) Georgia statute which retained the death penalty for six categories of crime. In addition to the six categories of crime for which the legislature retained the death penalty, the Georgia legislature also adopted new trial procedures and capital sentencing guidelines that it mandated be followed before imposition of the death penalty upon one convicted of a capital offense was authorized. For example, the Georgia statute established a bifurcated trial, including a separate sentencing stage wherein evidence in aggravation, extenuation, and mitigation of the crime was presented. Additionally, the judge was required to instruct the jury as to any of 10 statutory aggravating circumstances that were supported by the evidence and that it, the jury, must find, and specify, at least one of the ten aggravating circumstances beyond a reasonable doubt before they could adjudge the death penalty. Finally, the new statute required expedited and automatic direct review by the state supreme court.

The Supreme Court upheld the new Georgia statute as passing constitutional muster because the jury's attention had been focused "on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg,* 428 U.S. at 206, 96 S.Ct. at 2940, 49 L.Ed.2d at 893. In particular the Court was impressed with the channeling of the jury's discretion such that the jury could not impose the death sentence in a wanton and freakish manner. The Supreme Court arrived at the same conclusion with regard to Florida's reenacted statute. *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49

L.Ed.2d 913, *reh'g den.* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

## II.

## Impact Of *Furman* On Article 118, UCMJ

What, then, is the status of Article 118, UCMJ? In 1950 Congress enacted Article 118, Uniform Code of Military Justice, 10 U.S.C. § 118. That article defines the offense of murder within the military community. Within that statute Congress identified four specific types of murder of which two, premeditated murder [Article 118(1)] and murder committed during the commission of certain felonies [Article 118(4)], were designated capital offenses. The other two types of murder, death as a result of an act done with the intent to kill or inflict great bodily harm [Article 118(2)] and death resulting from an act inherently dangerous to others [Article 118(3)], were designated as offenses punishable "as a court-martial may direct."[2] *See* R.C.M. 1003(b). Offenses punishable "as a court-martial may direct" have generally been understood to carry any punishment exclusive of death, *see, e.g.,* para. 127(c), (Article 118) MCM, 1969; para. 43(e), Part IV, MCM, 1984, and exclusive of those punishments deemed cruel and unusual under Article 55, UCMJ. Article 118 has not

[2]The legislative history to Article 56, UCMJ, wherein the Congress gave the President broad authority to set the maximum punishment for offenses which a court-martial may direct and which a court-martial could not thereafter exceed when directing punishment, clearly reveals that Congress never intended the President to deal in any way with the death penalty. In fact, the hearings relating to Article 56, in particular, reveal concern that the wording of the provisions be carefully articulated so that assurance could be had that the President could never make an offense a capital offense that the Congress itself had not declared capital. Index and Legislative History of the Uniform Code of Military Justice, HH at 1187.



been amended since the enactment of the UCMJ. Thus, Article 118 is a pre-*Furman* statute.[3]

The next step is to determine what impact the Supreme Court's decisions in *Furman* and *Gregg* have on pre-*Furman* statutes, such as Article 118, in which the death penalty is authorized but fails to set forth *Furman-Gregg* type guidelines.[4] In other words, what is the status of Article 118 in view of *Furman?*

I believe the concurring and dissenting opinions in *Furman* clarify its impact on Article 118's status.[5] First, let us look at the concurring opinions that provide the

[3]By analogy then, Article 118—and any other death penalty offenses within the UCMJ, with the exception of Article 106a—should be in the same status as those state statutes which *Furman v. Georgia* delared unconstitutional. Since *Furman,* at least 35 of those states having *Furman*-invalidated statutes, have, through the positive action of their legislatures, taken action to reinstate the death penalty for some offenses and provide the guidelines required by *Furman. E.g., Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

[4]We do recognize, as the Court of Military Appeals did in *Matthews,* that many of the procedures within the military justice system, such as a bifurcated trial and the opportunity to present aggravating, extenuating and mitigating evidence on sentencing, probably meet some of the Supreme Court's concerns. The court-martial process did not, however, address the concept of finding and weighing aggravating and mitigating factors by some identified standard such that unfettered, and possibly discriminatory, discretion was not controlled.

[5]We must look at the various concurring and dissenting opinions to attempt to elicit the intended impact of *Furman* because no unified majority opinion explaining the result was arrived at by the Court. Accordingly, what other way can we determine the exact intent of the Court other than to glean from the concurring and dissenting opinions what the Court as individuals believed was the impact of the decision. *See Gregg v. Georgia,* 428 U.S. at 169, n. 15, 96 S.Ct. at 2909 n. 15, 49 L.Ed.2d at 859, n. 15 (1976); *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); Annotation, "Supreme Court's Views on Constitutionality of Death Penalty and Procedures Under Which It Is Imposed." 51 L.Ed. 886; Annotation, "Binding Effect Upon State Courts of Opinion of United States Supreme Court Supported by Less Than Majority of All Its Members." 65 ALR3d 504.

narrowest grounds for the majority's opinion. Justice Stewart concurred in reversing Furman's sentence to death because he believed that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S.Ct. at 2763, 33 L.Ed.2d at 390. Justice White, also concurring, stated:

> . . . [A]s the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.
>
> In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative "policy" is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment.

408 U.S. at 313-314, 92 S.Ct. at 2764, 33 L.Ed.2d at 392-393.

Now let us turn to the dissenters. Chief Justice Burger stated in his dissent:



> The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems clear: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past.

408 U.S. at 397, 92 S.Ct. at 2807, 33 L.Ed.2d at 440.

The Chief Justice went on to say:

> While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant *statutory* changes will have to be made. . . . (Emphasis added.) [L]egislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.

408 U.S. at 400, 92 S.Ct. at 2809, 33 L.Ed.2d at 442. Finally, the Chief Justice stated:

> Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo.

Rather than providing a final and unambiguous answer on the basic constitutional question, *the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress.* (Emphasis added). While I cannot endorse the process of decision making that has yielded today's result and the restraints that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.

408 U.S. at 403, 92 S.Ct. at 2811, 33 L.Ed.2d at 444. Also dissenting was Justice Powell who wrote:

> Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degrees by five members of the Court, *today's departure from established precedent invalidates a staggering number of state and federal laws.* (Emphasis added.) The capital punishment laws of no less than 39 States (footnote omitted) and the District of Columbia are nullified. In addition, *numerous provisions of the Criminal Code of the United States and of the Uniform Code of Military Justice also are voided.* (Emphasis added.) The Court's judgment not only wipes out laws presently



> in existence, but denies to Congress and to the legislatures of the 50 States the power to adopt new policies contrary to the policy selected by the Court. . . .
>
> [T]he impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitable conduct. It is the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped.

408 U.S. at 462-463, 92 S.Ct. at 2840, 33 L.Ed.2d at 418.

Justice Blackmun, dissenting, found:

> Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided. No longer is capital punishment possible for [various federal crimes listed in Title 18 U.S. Code]. Also in jeopardy, perhaps, are the death penalty provisions in various Articles of the Uniform Code of Military Justice. 10 USC §§ 885, 890, 894, 899, 901, 904, 906, 913, *918*, and 920. (Emphasis added.) All these seem now to be discarded without a passing reference to the reasons, or the circumstances, that prompted their enactment, some very recent, and their retention in the face of efforts to repeal them.

408 U.S. at 412, 92 S.Ct. at 2815, 33 L.Ed.2d at 449.

From these dissents, it would appear that at least four justices of the Supreme Court believed that *Furman* declared all state and federal statutes, including the UCMJ, null and void if they authorized the imposition of the death penalty but did not meet the standards identified by *Furman*.[6] The Ninth Circuit Court of Appeals was compelled to reach the same conclusion in *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984). In fact, it based its conclusion on the position not only of petitioner, but also of the Government, whose brief on this issue in the district court stated that Title 18 U.S.C. § 794's death penalty provision is:

> . . . unenforceable and void because it sets forth no *legislated* guidelines to control the fact-finder's discretion. (Emphasis added.) The Department of Justice has long been of the view that *Furman* rendered section 794's death penalty provision unconstitutional. *See Imposition of Capital Punishment:* Hearings on S. 1, S. 1400, and S. 1401 Before the Subcomm. on Criminal Laws and Procedures of the Comm. of the Judiciary, 93d Cong., 1st Sess. 43 (1973) (statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice); To Establish Constitutional Procedures

[6]Even though three of the justices who participated in *Furman* are no longer members of the Court, six of the *Furman* Court do remain and might continue to represent a majority should the constitutionality of Article 118's death penalty be presented. In playing the numbers game then, we know that of those six remaining justices, two justices would declare the death penalty unconstitutional per se; one justice would not declare the death penalty unconstitutinal per se but would declare discretionary statutes unconstitutional; and four justices believe the *Furman* decision declares the death penalty statutes in existence at the tiine of the opinion null and void.



> for the Imposition of Capital Punishment: Hearings on S. 1382 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 95th Cong., 1st Sess. 22 (1977) (statement of Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice); Capital Punishment: Hearings on S. 114 Before the Comm. of the Judiciary, 97th Cong., 1st Sess. 22 (1981) (statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice). Moreover, the Senate has recently passed a bill, supported by the Justice Department, that would authorize the imposition of the death penalty for certain crimes, including espionage. S. 1765, 98th Cong., 2d Sess., 130 Cong.Rec.S. 1491-93.
>
> In light of the above, we believe it clear that the death penalty provision of the espionage statutes is unconstitutional. It cannot be saved by judicial formulation of the missing, but essential, statutory guidelines.

729 F.2d at 1225-6. *See McKenzie v. Risley*, 801 F.2d 1519 (9th Cir. 1986), *cert. denied* ___ U.S. ___, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).

Additionally, the decisions of the federal circuit courts, *e.g.*, *United States v. Watson*, 496 F.2d 1125, 1129 (4th Cir. 1973) and *United States v. McNally*, 485 F.2d 398 (8th Cir. 1973) *(en banc)*, reflect the two differing rationales state and federal courts have utilized for analyzing the continuing constitutional validity of statutes related to the

imposition of the death penalty in light of *Furman*.[7] *Watson* sides with the classification rationale while *McNally* reflects the penalty rationale.[8]

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[7]Annotation, "Effect of the Abolition of Capital Punishment on Procedural Rules Governing Crimes Punishable by Death—Post-*Furman* Decisions." 71 A.L.R.3d 454, 457-460.

[8]The *Watson* court was concerned with the impact of *Furman* on a federal statute that gave the defendant a procedural right to two attorneys if he faced the possibility of the imposition of the death penalty. Since it was unable to determine that the sole reason Congress gave the accused the procedural right in question was because of the possibility of the imposition of the death penalty, a possibility that no longer existed, it refused to hold the procedural right inapplicable to a defendant convicted under the statute which Congress had done nothing about since *Furman*. Thus, *Watson* looked at the death penalty provision as a not only a penalty provision that may or may not be capable of imposition but as a means for classifying an offense as one of the most severe types of offenses.

> We have no doubt that *Furman* raises pointed legislative questions of whether section 3005 should not be repealed or whether the various provisions of Title 18 which purport to authorize the imposition of the death penalty should be amended in an effort to harmonize them or to validate them under *Furman*. . . . But we conceive these to be legislative questions and not judicial ones, especially when a holding by us that *Furman* has effected a repeal of section 3005, of necessity, would probably create serious doubt as to whether the various other provisions of Title 18 and the Federal Rules of Criminal Procedure, to which we have referred, have also been repealed. The question of whether these statutes and the rule should now be repealed merits the prompt consideration of Congress and the Rules Committee, but we regard our role as one of proceeding with caution unless and until it unmistakably and clearly appears that *Furman* has had this effect. This, we fail to find.

*Watson*, 496 F.2d at 1129-1129. The Court then held that the defendant had the statutory right to have two attorneys because he was facing conviction for a crime that authorized the death penalty even though the imposition of the death penalty under federal law as it existed at that time was ineffectual.

*McNally*, on the other hand, determined that when the death penalty has been determined by a court or the prosecution not to be appropriate because of *Furman*, "the case lost its capital nature" and the defendent was not entitled to the advantage of any procedure which was otherwise required in the



These judicial decisions shed some light on how we might interpret the status of Article 118 as a whole, or the status of its provision authorizing imposition of the death penalty in particular. The courts that follow the classification rationale hold that the statutes identifying offenses as "capital offenses" established a category of offenses that because of their gravity remained classified as "capital offenses." That being so, all statutes that interrelated to a "capital offense" statute remained operative if a capital offense was involved. The courts using the penalty rationale declare that since capital punishment provisions were no longer constitutional unless they met current schemes offered by the judiciary, the "capital offense" no longer existed. Thus, any legislation that was triggered by the possibility of imposition of the death penalty was not operative until that penalty was again constitutionally imposable. Hence, while the death penalty may be authorized by the legislature, its imposition is constitutionally prohibited; the authorization provision is invalid.

I can accept the penalty rationale more readily than I can the classification rationale because of the concept of severability. It is well-established that a statute may be constitutional in part and unconstitutional in another; and, as long as the unconstitutional provision is severable from the rest of the statute, the constitutional provision will stand with its unconstitutional aspect rejected. *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). But regardless of which rationale one accepts, I believe little argument remains with the fact that *Furman*, at the very least,

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prosecution of a capital offense. *McNally*, 485 F.2d at 407. Thus, *McNally* looked at the death penalty provision as solely a penalty provision.

declared all provisions of statutes authorizing imposition[9] of capital punishment existing at the time of the decision ineffectual. *Gregg v. Georgia,* 428 U.S. at 153, 96 S.Ct. at 2920; *Watson,* 496 F.2d 1125; *In re Ex Parte Bynum,* 294 Ala. 78, 312 So.2d 52 (1975).

All of this precedent tells me that the federal and state courts have exercised caution when called upon to interpret the impact of *Furman* on a statutory authorization for imposition of the death penalty. Where legislatures have not specifically and affirmatively indicated their intent since *Furman* to authorize imposition of the death penalty by reenacting, reinstating, modifying, or, in some other permissible way, validating the authorization provision in question, these courts have also exercised caution when they have had to determine the applicability of statutes that grant or deny a defendant a procedural right that is dependent upon him facing the possibility of the imposition of the death penalty. In light of this exercise of caution, I believe this Court should also exercise caution in interpreting legislative inaction or implicit ratification of the U.S. Congress when determining whether Article 118's authorization for the imposition of death remains valid since the decision in *Furman.* Although appellate courts act on the presumption of constitutionality of statutory provisions, because the case law since *Furman* has not made it unmistakably clear to me that Article 118's death penalty authorization provision is constitutional, I cannot find that it is constitutional. See *United States v. Watson,* 496 F.2d 1125, 1129 (4th Cir. 1973). If it is not a constitutionally valid provision because Congress has not

[9]The key word here is "imposition". *Furman,* at the very least, declared imposition of the death penalty outside its guidelines unconstitutional. The death penalty was still authorized but its imposition, the ability to effectuate it, was possible only after the development of specific and controlled discretionary guidelines and procedures and the application of those guidelines and procedure by the authorized fact-finder.



affirmatively demonstrated its reinstatement of that penalty provision, let alone given the guidelines required by *Furman-Gregg,* then the imposition of the death penalty within the military justice system is unconstitutional.

## III.

## Presidential Effectuation of An Invalid Statutory Provision

Let us presume, however, that Article 118's provision authorizing the death penalty is not void but merely ineffectual. How can it be effectuated? In this particular case, can the President pursuant to Article 36, UCMJ, effectuate, *i.e.,* make constitutionally permissible, Article 118's authorization for imposition of the death penalty, by promulgating R.C.M. 1004?

In *United States v. Matthews,* 16 M.J. at 354, the Court of Military Appeals held that the sentencing standards then existing under the UCMJ were defective because they failed "to require that the court members make specific findings as to individualized aggravating circumstances—findings which can, in turn, be reviewed factually and legally." *Id.,* at 380. In dicta the Court then indicated how the defective sentencing standards could be corrected:

> Congress can take action to remedy this defect that now exists in the sentencing procedure employed by courts-martial in capital cases. However, corrective action also can be taken by the President in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers expressly delegated to him by Congress. *See* Article 36, UCMJ, 10 U.S.C. § 836.

The Court further expounded on its theory that the President could take the corrective action needed:

> The congressional delegation of powers to the President has traditionally been quite broad in the field of military justice. Pursuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes, the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. (Footnote omitted.) However, as contemplated by Article 56, of the Uniform Code, 10 U.S.C. § 856, the President prescribes maximum punishments for the various offenses. (Citation omitted.) The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases. *Cf. Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). Indeed, a proposed revision[10] of the Manual for Courts-Martial, which [is] . . . R.C.M. 1004 . . . prescribes special procedures for sentencing in capital cases.

*Matthews,* 16 M.J. at 380-381. (Footnote added).

[10]The proposed revision of the Manual for Courts-Martial mentioned by the Court of Military Appeals in *Matthews* referred to what ultimately became Rule for Courts-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM) 1984.



The President heeded the *Matthews* dicta and promulgated R.C.M. 1004. Despite our supervisory court's dicta in *Matthews,* and its apparent anticipatory sanction of the President's action, I believe there is a separation of powers issue that the Court of Military Appeals may not have considered at the time. Additionally, I believe significant case law addressing the separation of powers issue has been decided since *Matthews, see Mistretta v. United States,* ___ U.S. ___, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); *INS v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *Bowsher v. Synar,* 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986); *United States v. Harper,* 729 F.2d 1216 (9th Cir. 1984), that impacts upon the continued validity of the dicta such that it may reexamine *Matthews. See United States v. Carter,* 25 M.J. 471, 473 (C.M.A. 1988).

Elementary civics teaches us that:

> . . . the executive department, like the judicial, must yield in most matters to the creative power of the legislature (footnote omitted); the legislature makes laws and the executive enforces them when made, and each department is, in the main, supreme within its own field of action (footnote omitted). The executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his conduct is tantamount to a repeal (. . . *Henry v. State,* 10 Okla.Crim. 369, 136 P. 982), enactment (*Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 . . . ;), variance, or enlargement (*Whitcomb Hotel, Inc. v. California Employment Com.,* 24 Cal.2d 753, 151 P.2d 233,

> 155 A.L.R. 405; *Boone v. Kingsbury,* 206 Cal. 148, 273 P. 797, *cert. den.* and *app dismd* 280 U.S. 517, 50 S.Ct. 66, 74 L.Ed. 587, and *cert. den.* and *app dismd* 280 U.S. 517, 50 S.Ct. 66, 74 L.Ed. 588). Thus, the President of the United States has no authority, even under the clause requiring him to see that the laws are faithfully executed, to suspend of his own motion the operation of acts of Congress (*Kendal v. United States,* 37 U.S. 524, 9 L.Ed. 1181).

16 Am.Jur.2d sec. 305 at 821-822.

Just as the President cannot legislate, neither can the courts by judicial construction. *See United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). As the majority notes in its equal protection discussion: "In *Gregg* the Supreme Court reasoned that because of the complex issues involved in determining the moral values of society and the social utility of the death penalty, it is particularly within the province of the legislature to establish the degree of punishment for certain classes of crime." This, for me includes, factors that differentiate capital murder from non-capital murder.

Whether an unconstitutional provision of a death penalty statute can be subsequently effectuated with corrective action has been answered affirmatively by *Gregg v. Georgia,* 428 U.S. at 206, 96 S.Ct. at 2940, and *Proffitt v. Florida,* 428 U.S. at 242, 96 S.Ct. at 2960, when the Supreme Court approved new statutes enacted by the state legislatures subsequent to *Furman.* The new legislation reaffirmed the legislative policy of the appropriateness of the imposition of the death penalty as to certain categories of crime and channeled the decision-making for imposition



of the death penalty by establishing certain specified aggravating factors and several procedural safeguards. Positive action to establish or reaffirm policy and to establish standards for channelling decision-making in an attempt to make law as to crime and punishment in compliance with the Constitution is beyond question the sole province of the legislature. *United States v. Wiltberger,* 18 U.S. 76, 5 Wheat. 76 (1820). As with many of Chief Justice Marshall's opinions, the principle he enunciated about the power to legislate being within the sole province of the legislature has remained good law through the years. *Whalen v. United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *Bell v. United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1954); *United States v. Evans,* 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *Howell v. Mississippi,* 300 So.2d 774 (1974).

My Brothers give four reasons for their belief that the President can validate the ineffectual provisions of Article 118. First, they rely on the Congressional enactment, unchanged since 1951, of Article 36, UCMJ, which they believe delegates to the President that authority:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under

this article shall be uniform insofar as practicable and shall be reported to Congress.[11]

Second, they rely on what they consider the expression of congressional intent with regard to the President's authority to set punishments, including the death penalty, as explicitly set forth in Article 56, UCMJ: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."[12] The third reason is what they believe is recognition of the authority of the President to do so by the Court of Military Appeals in their decision in *Matthews,* 16 M.J. at 354; the President's implementation of that advice; and the Congressional ratification, albeit *sub silentio,* of the provision in question.[13] Finally, the majority believes that the President has been properly delegated broad authority to effectuate Article 118's death penalty provision because the President's authority as Commander-in-Chief of the Armed Forces is based upon a long-standing special relationship with the Congress, an historical relationship so unique from any other, that he alone has the expertise to determine what is necessary to maintain morale and discipline within the military. This special relationship, they conclude, enables the President to meet the *Furman* mandate better than any other mechanism.

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[11] Some of my Brother judges believe that the President has merely "applied the principles . . . recognized in the trial of criminal cases in the United States district courts, . . ." and that those principles are the guidelines established by the Supreme Court in *Furman* and *Gregg.* My counter-argument is that the courts, including the United States Supreme Court, have recognized that they cannot legislate. *United States* v. *Harper,* 729 F.2d 1216 (9th Cir. 1984); *see, e.g., Furman,* 408 U.S. at 398, 92 S.Ct. at 2808 (Burger, C.J., dissenting).

[12] The Table of Maximum Punishments, paragraph 127(c), Manual for Courts-Martial, 1951, and 1969, show the President referring to Article 118 for a definition of the maximum punishment permitted for murder rather than him stating it in his own terms as the maximum senence permissible.

[13] Provisions of the Manual for Courts-Martial made pursuant to Article 36, UCMJ, must be reported to Congress. Article 36(b), UCMJ.



I do not accept those reasons because of two long standing principles: (1) Congress cannot delegate its legislative power to the President (the nondelegation principle); *Marshall Field and Co. v. Clark,* 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892);[14] and (2) penal rules must be strictly construed.[15]

In *United States v. United Verde Copper Co.,* 196 U.S. 207, 25 S.Ct. 222, 49 L.Ed. 449 (1905), the Supreme Court applied the nondelegation principle to the executive branch. In *United Verde* the Secretary of the Interior had established regulations under the supposed authority of Congress to implement an act of Congress. In doing so, he tried to give "an authoritative and final construction of the statute" and in doing that the Court said:

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[14] Two important facts to remember in this regard are the constitutional provisions speaking about the legislative and executive branch responsibilities toward the armed forces. Article I, section 8, clause 14 states that "The Congress shall have the Power . . . To make Rules for the Government and Regulation of the land and naval Forces." Article II, section 2 states; "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ."

[15] "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger,* 18 U.S. 76, 5 Wheat. (U.S.) 76, 95, 5 L.Ed. 37, 42 (1820); *Furman* v. *Georgia,* 408 U.S. at 452-453, 92 S.Ct. at 2835–36 (Powell, J., dissenting). Additionally, "[t]he Supreme Court is most likely to reject broad delegations of congressional power, typically on statutory grounds, when action of the government agency claiming delegated power touches constitutionally sensitive areas of substantive liberty." Tribe, AMERICAN CONSTITUTIONAL LAW, (2d Edition, 1988) at p. 365. What more constitutionally sensitive area of substantive liberty can there be than an individual's life? *See California* v. *Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) and cases cited in n. 9, *e.g., Eddings* v. *Oklahoma,* 455 U.S. 104, 117-8, 102 S.Ct. 869, 877-8, 71 L.Ed.2d 1 (1982).

> If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation: it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary.

196 U.S. at 212, 25 S.Ct. at 225.[16]

In *Reid v. Covert,* 354 U.S. 1, 38-39, 77 S.Ct. 1222, 1241-42, 1 L.Ed.2d 1148, 1172 (1957), the President's authority to act in his capacity as Commander-in-Chief with regard to the administration of military justice specifically was addressed:

> It must be emphasized that every person who comes within the jurisdiction of courts-

[16]In *United States* v. *Grimaud,* 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), the Supreme Court upheld the action of the Secretary of Agriculture's use of his legislatively delegated powers in making criminal the violation of rules and regulations made and promulgated by him under the authority of a statute covering forest reservations. The Court reiterated that only Congress can legislate and quoting its previous opinion in *Marshall Field and Co. v. Clark,* 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892) stated:

> The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside the halls of legislation.

*Grimaud,* 220 U.S. at 519, 31 S.Ct. at 484, 55 L.Ed. at 569. The Court then explained that while the act of Congress in question did not expressly declare the particular activity in question unlawful, the statutes involved did have encompassing terms and expressly stated that failure to comply with the rules and regulations of the Secretary would subject the offender to the penalty imposed by Congress.



> martial is subject to military law—law that is substantially different from the law which governs civilian society. Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice. Moreover, it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war. . . . If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

In summary, "it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on

> the security and order of the group rather than on the value and integrity of the individual. (Footnotes omitted). The President's authority as head of the executive branch and as Commander-in-Chief is, therefore, not unfettered authority.

*See also Industrial Union Department, AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 671, 100 S.Ct. 2844, 2878, 65 L.Ed.2d 1010, 1052 (1980); *Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 543, 101 S.Ct. 2478, 2507, 69 L.Ed.2d 185, 222 (1981).

Using these principles to analyze the authority of the President by virtue of Article 36 to promulgate R.C.M. 1004, we must address two issues. First, anticipating that the Supreme Court's recognition that there are "inherent differences in values and attitudes [which] exist that separate the military establishment from the civilian society" might be considered a means by which the President could be "inferred" to understand "the intent" of Congress and thus allow him, under the rubric of his special relationship with Congress, to effectuate *Furman-Gregg* criteria for the imposition of the death penalty, let us examine Article 118 to see if there are inherent differences that would separate the former from the latter. In other words, do inherent differences in values and attitudes exist that separate the military from the civilian community such that imposition of the death penalty in the former and not the latter is constitutionally permissible? I have no doubt that they do. But, I do doubt, that the differences, at least during peacetime, are so inherent that Congress need not itself establish *Furman-Gregg* criteria.[17]

[17]On the other hand, if we could identify a difference in values and attitudes, then, maybe, Presidential action in establishing the aggravating factors in R.C.M. 1004(c) would be justified.



I am not at all certain that murder, at least the two types of murder that concern us in appellant's case,[18] or even the particular circumstances surrounding the commission of that offense by this particular appellant as alleged, including the aggravating factors plead and found in the charge and specifications, identify any values or attitudes so different as to separate the military establishment from the civilian society. In fact, I believe the Court of Military Appeals has already addressed this issue.

In *United States v. Matthews,* 16 M.J. at 354, the Court recognized that circumstances might exist which would permit rules governing capital punishment to be different from those applicable to civilians. But, in Matthews' situation, the murder and rape of a civilian dependent, offenses which the court was unable to relate to military exigencies, the Court found:

> [N]o reason why Matthews should be executed for his [crimes] if the sentencing procedures used by the court-martial failed to meet the standards established by the Supreme Court for sentencing in capital cases in civilian courts. There is no military necessity for such a distinction; and we do not believe that applying lower standards in this case would conform to the intent of Article 55 or of the Eighth Amendment.

*Matthews,* 16 M.J. at 369.[19] The only difference between

[18]Premeditated murder (Article 118(1)) and murder during the commission of a felony (Article 118(4)).

[19]Recognizing that the Court of Military Appeals made this statement in applying the principle to the issue of cruel and unusual punishment rather than a delegation of power issue, it would seem to me that the same type of justification would have to be used under an equal protection argument if

Matthews and appellant is that the President has since promulgated R.C.M. 1004. Otherwise, the offense of murder is the same.[20] Thus, I do not believe that sufficient differentiating values and attitudes have been adequately identified, let alone identified as inherent, to permit the death penalty to be effectuated by the President rather than by the Congress.

## IV.

## Is There A Proper Delegation?

Even if, based on the facts of this particular case, those differentiating values and attitudes are identified adequately and are inherent to the military, the process by which that identification is validated must be by a proper delegation.[21] There is nothing in the congressional

proper authority did establish procedures for imposition of the death penalty for service members that differed from that of their civilian counterparts. I do not address, therefore, the issue of whether military status alone is sufficient to overcome any equal protection arguments to permit the imposition of the death penalty on service members and not civilians for offenses committed under the same nine similar circumstances.

[20] One could argue that the primary victim in appellant's case is his officer-in-charge and his dependent civilian wife while Matthews murdered a civilian dependent of an Army officer. The status of appellant's victim as officer-in-charge could have been one of the aggravating factors under the President's scheme but was not plead. Thus, the victim's officer status, which might have created that military significance, was not used by the Government at trial and cannot now be used as a means to differentiate appellant's case from Matthews' situation on the basis of a special need of the military.

[21] As we have previously noted, the military justice system is dependent upon both the legislative and executive branch for its creation and effectuation. *See* Footnote 14. Therefore, since Congress was endowed with the authority "to make rules and regulations for the governing" of the armed services, the Congress legislates and the President, as head of the executive branch and as commander in chief of the armed forces, enforces that legislation. Where Congress has failed to express an intent to require certain action, *e.g.*, require the taking of an oath to demonstrate bona fides at the time of submission of an application to an executive agency, the executive could not then prescribe that violation of the requirement would result in criminal penalty. *Williamson v. United States,* 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278 (1907).



delegation in Article 36, UCMJ, that can be pointed to that would demonstrate that the identification of the differentiating values and attitudes was proper. *See United States v. Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *O'Neal v. United States,* 140 F.2d 908 (6th Cir. 1944).

It may well be true that the standards set forth in R.C.M. 1004 meet the guidelines set forth in *Gregg v. Georgia,* 428 U.S. at 153, 96 S.Ct. at 2909, *e.g.*, aggravating factors and procedural safeguards are present; and, it would appear that the concerns of the Court of Military Appeals have been eliminated. But, the President's arbitrary promulgation of such rules without guidance from the legislature that results in the effectuation of an otherwise unconstitutional statutory provision is not a proper application of the delegation process. *See The Aurora v. United States,* 11 U.S. 382, 7 Cranch 382, 3 L.Ed. 378 (1813). In the numerous cases cited by the Supreme Court since *Aurora,* those that upheld a statutory delegation on grounds that the acts complained of were not a result of improper delegation, were based on statutes that had provided specific guidelines upon which the President was to base his action and which prevented the executive from taking what the courts considered arbitrary action; and, most importantly, the President or a member of the executive branch took his action in accordance with those statutory guidelines. *See, e.g., Union Bridge Co. v. United States,* 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523 (1907); *Marshall Field and Co. v. Clark,* 143 U.S. at 649, 12 S.Ct. at 495; *United States v. Gordon,* 580 F.2d 827 (5th Cir. 1978); *United States v. Pastor,* 557 F.2d 930 (2d Cir. 1977). *See also* Annotation, "Validity of Statute or Ordinance Vesting Discretion in Public Officials without Prescribing a Rule of Action," 92 A.L.R. 400; Annotation, "Validity of Delegation to Drug Enforcement Administration of Authority to Schedule or Reschedule Drugs Subject to

Controlled Substances Act (21 U.S.C. §§ 801 et seq.)," 47 A.L.R.Fed. 869.

In *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), the Supreme Court established a three-stepped analysis to determine whether the President's authority, exercised in light of a congressional delegation, was too broad:

> . . . we look to the statute to see whether the Congress has declared a policy with respect to that subject, whether the Congress has set up a standard for the President's action, whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

293 U.S. at 415, 55 S.Ct. at 246, 79 L.Ed. at 456. The Supreme Court recently breathed new life into *Panama* in the realm of criminal punishments. *Mistretta v. United States,* ___ U.S. ___, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Using *Panama's* three-stepped analysis as recently applied by *Mistretta,* I find Articles 36, 56, and 118 itself so deficient that reliance on an Article 36 delegation as a proper congressional delegation to the President for effectuating guidelines that would authorize the imposition of the death penalty within the military justice system is misplaced and improper. This is particularly so when such a delegation relates to the imposition of the supreme and ultimate penalty.[22]

First, I do not believe that Congress has set a policy with regard to the imposition of the death penalty for

[22] And, it is only to the imposition of the death penalty that my dissent applies. I offer no comment on the validity of the delegation with regards to other matters that may arise within the military justice system at a later time.



Article 118 since *Furman.* In fact, the only offenses for which the Congress has been able to obtain a consensus for imposition of the death penalty in appropriate circumstances have been in connection with air piracy [49 U.S. C.A. §§ 1472(i)(1)(B), 1472(n)(1)(B)] and espionage by military personnel [Article 106a, UCMJ, 10 U.S.C. § 906a]. *See Gubiensio-Ortiz v. Kanahele,* 857 F.2d 1245 (9th Cir. 1988); *see also Thompson v. Oklahoma,* ___ U.S. ___, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (O'Connor, J., concurring in judgment). My failure to presume that Congress has set a general death penalty policy is also based on recognition of the public controversy surrounding capital punishment, at least as to some offenses, and the reluctance of the federal courts and the United States Sentencing Commission to presume the will of Congress in light of possible adverse congressional reaction. *See Gubiensio-Ortiz,* 857 F.2d at 1256.

Second, I do not believe that we can presume, as the majority would have us, that because of a presidential reporting requirement, the Congress has given tacit approval or has ratified the presidential promulgation of R.C.M. 1004. The Supreme Court has clearly stated that when "substantial restraints are being placed on constitutional procedures" and they are "in conflict with our long-accepted notions of fair procedures, such action must be based upon explicit, not implicit, authority. Such decisions cannot be assumed by acquiescence or non-action." *Greene v. McElroy,* 360 U.S. 474, 507, 79 S.Ct. 1400, 1419, 3 L.Ed.2d 1377, 1396-97 (1959). The *Greene* Court further enunciated the significance of explicit action on the part of Congress:

> They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized (citation omitted), but also

> because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with the authority to decide them.

*Id.* at 507, 79 S.Ct. at 1419, 3 L.Ed.2d at 1397.

In *Greene v. McElroy,* the petitioner's work opportunities were being severely limited by the Department of Defense without affording him a hearing that comported with "our traditional ideas of fair procedures." In appellant's case, he is being subjected to the imposition of the death penalty without being afforded the constitutional assurance that imposition of such an extreme penalty is a current policy adopted by the branch of government established to determine such policy.

Thus, I conclude that Congress has not set a policy with regard to imposition of capital punishment in the military justice system since *Furman.* I further conclude, upon examination of Article 36, that no standards were set by the Congress with regard to what factors the President should apply in determining when the imposition of the death penalty would be authorized. As to the third step in a *Panama* analysis, I could conclude that the Presidential finding requirement has been met, since only the President can order the punishment of death executed. R.C.M. 1207; *see* Article 71(a), UCMJ. Therefore, having failed to meet two of the three steps required by *Panama,* I find that the President's authorization of imposition of capital punishment pursuant to findings made in accordance with R.C.M. 1004 is based upon an unconstitutional delegation of authority.



## V.

## Limitation Of Article 36, UCMJ

Throwing caution to the winds, however, let's do some further analysis by assuming that Congress did establish a death penalty policy, at least with respect to Article 118, and did intend to delegate to the President under Article 36, UCMJ, the ability to correct provisions of the UCMJ held ineffectual until the *Furman* mandate was complied with. The congressional delegation must still be examined because it must be capable of proper application by the President. In order to ensure that proper application, the delegation must establish certain standards for the President to follow when he acts pursuant to the delegation.[23]

I find that the standards enunciated by Congress are either non-existent or very restrictive. When one examines the judicial opinions addressing delegation after *Panama,* and in particular when one examines the delegation by Congress to the Sentencing Commission, as described at great length in *Mistretta,* one finds the standards enunciated by the Congress must be specific and detailed.[24]

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[23]For example, compare Article 36, UCMJ (quoted *infra*) with the Federal Sentencing Commission Act wherein the Congress set forth categories for determining offenses, categories for determining categories of defendants, four purposes, three goals, and a specific tool, etc. *See Gubiensio-Ortiz v. Kanahele,* 857 F.2d at 1245, *see also* Annotation, "Validity of Delegation to Drug Enforcement Administration of Authority to Schedule or Reschedule Drugs Subject to Controlled Substances Act (21 USC §§ 801 et seq.)," 47 ALR Fed 869.

[24]Sentencing Reform Act of 1984, as amended 18 U.S.C. § 3551 *et seq.* (1982 ed., Supp. IV), and 28 U.S.C. §§ 991-998 (1982 ed., Supp., IV).

Looking at Article 36, however, I fail to find such specific and detailed standards. I do find that the matters which Congress delegated to the President are very general and involve matters of procedure, not matters involving substantive law.[25] *Ellis v. Jacob,* 26 M.J. 90 (C.M.A. 1988); *United States. v. Frederick,* 3 M.J. 230 (C.M.A. 1977). This fact provides another ground for my conclusion that R.C.M. 1004 is an improper basis upon which to authorize imposition of the death penalty.

The aggravating factors set forth in R.C.M. 1004(c) are matters of substantive law and not procedure. Two Supreme Court opinions serve as the judicial authority for this conclusionary statement. *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) and *California v. Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

In *Bullington* the Supreme Court referred to the Missouri statute that enacted death penalty legislation after the *Furman* decision as containing "substantive standards to guide the discretion of the sentencer" and affording "procedural safeguards to the convicted defendant." 451 U.S. at 433, 101 S.Ct. at 1853, 68 L.Ed.2d at 275.[26] The

[25]While we believe rules of evidence involve substantive law, the congressional delegation is a little more specific in that it directs the President to adopt rules that apply to trials in federal district courts—which we recognize as the Federal Rules of Evidence, rules enacted by the Congress, and upon which the Military Rules of Evidence were based, with some modification, due to the needs of the military law practice. Appendix 22, Analysis, MCM, 1984.

[26]I disagree with the Government's contention and the majority's interpretation that the Supreme Court considered the aggravating factors procedural matters in *Dobbert* v. *Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). The *Dobbert* Supreme Court was addressing the factual situation involving a change in the role of the judge and jury in the imposition of the death penalty. I agree that the change in the roles made by the Florida



statute that the *Bullington* court examined had two separate provisions. One addressed purely procedural issues, such as the requirement for a bifurcated trial, the jury's requirement to hear additional evidence in extenuation, mitigation, and aggravation. Additionally, this provision provided the judge with guidelines as to what he was to instruct the jury and his role in the proceedings after jury had made its decision. The second provision of the statute dealt with the legislature's specification of 10 aggravating and 7 mitigating circumstances which the jury had to find in writing and be convinced beyond a reasonable doubt that "any aggravating circumstance or circumstances that it finds to exist are sufficient to warrant imposition of the death penalty." *Bullington,* 451 U.S. at 434, 101 S.Ct. at 1853, 68 L.Ed.2d at 276. After careful analysis of *Bullington,* I believe the Court's "procedure" label—as interpreted by appellate Government counsel in their argument before this

legislature involved procedural matters; but, a determination that a change in role is procedural is far different from determining that the identification of certain factors are sufficiently aggravating as to make an individual eligible for the judge or jury to impose the death penalty is also a procedural matter. Additionally, the Florida statute had previously passed constitutional muster, both as to the aggravating factors to be considered and the procedural application of determining the presence of aggravating factors before imposition of the death penalty was authorized *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.,* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

Additionally, the Florida statute, which not only changed the role of judge and jury, but also identified aggravating factors which had to be found before the death penalty could be imposed, was enacted by the legislature and not by someone in the executive acting under a delegation of authority. Thus, no separation of powers—improper delegation or usurpation of authority—issue was or could be raised by the defendant in *Dobbert.* The only issue of concern for the Court was whether the change in the Florida statute violated *ex post facto* principles. The statutory changes served to ameliorate the appellant's potential for imposition of the death penalty because it provided "significantly more safeguards to the defendant than did the old. . . . Hence, viewing the totality of the procedural changes wrought by the new statute, we conclude that the new statute did not work an onerous application of an *ex post facto* change in the law." 432 U.S. at 295-6, 97 S.Ct. at 2301, 53 L.Ed.2d at 358.

court—was meant to apply to the change in procedure caused by the new legislation, *i.e.*, the new state statute gave the jury rather than the judge the responsibility for determining the presence of the statutorily created aggravating factors. The Court's "procedure" label had nothing to do with the establishment of the aggravating factors themselves. I base this conclusion on the fact that the Court expounded on its determination that the provisions of the statute almost equated to a trial on the merits, particularly with the use of the beyond a reasonable doubt standard. "By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.'" 451 U.S. at 444, 101 S.Ct. at 1858, 68 L.Ed.2d at 282. As a result the Court stated that "it is the State, not the defendant, that should bear 'almost the entire risk of error.'" 451 U.S. at 446, 101 S.Ct. at 1859, 68 L.Ed.2d at 283. It thus held that the State was not entitled, at defendant's second trial, to attempt to prove the aggravating factors it had failed to prove at his first sentencing hearing since he had, in reality, been found not guilty beyond a reasonable doubt of those aggravating factors. R.C.M. 1004 is almost identical to that Missouri statute, except for the specific aggravating and mitigating factors listed in the Missouri statute. Indeed, the Ninth Circuit Court of Appeals, *en banc*, recently held that Arizona's statute requiring the finding of aggravating factors beyond a reasonable doubt was unconstitutional because it placed with the trial judge the duty of finding the aggravating factor when it should have been the duty of the jury. The Court determined it should be the jury's decision because the aggravating factors were like elements of the offense. As such the defendant was entitled, in light of the Sixth Amendment, to a jury determination of the existence of those aggravating factors. *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988).



In *California v. Ramos*, Justice O'Connor, writing for a majority Court explained the Court's present interpretation of *Gregg:*

> In *Gregg* itself, the joint opinion of Justices STEWART, POWELL and STEVENS concluded that the Georgia sentencing scheme met the concerns of *Furman* by providing a bifurcated proceeding, instruction on the factors to be considered, and meaningful appellate review of each death sentence, (citation omitted.) Satisfied that these *procedural* (emphasis added) safeguards "suitably directed and limited" the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action," (citation omitted), the joint opinion did not undertake to dictate to the State the particular *substantive* (emphasis added) factors that should be deemed relevant to the capital sentencing decision. Indeed, the joint opinion observed: "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (Citation omitted.) ("The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy' "). (Footnote: Moreover, in approving the sentencing schemes of Georgia, Florida, and Texas, the joint opinions of Justices Stewart, POWELL,

> and STEVENS did not substitute their views for those of the state legislatures as to the particular *substantive* (emphasis added) factors chosen to narrow the class of defendants eligible for the death penalty. . . .)
>
> It would be erroneous to suggest, however, that the Court has imposed no *substantive* (emphasis added) imitations [sic] on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate.

463 U.S. at 1000, 103 S.Ct. at 3452-53, 77 L.Ed.2d at 1180.

The majority states that Article 36 "clearly delineates the general policy to prescribe pretrial, trial, and post-trial procedures for cases tried by courts-martial," and "clearly states that the authority is delegated to the President," and "does establish specific boundaries to limit the President's action under this provision" because the President "is bound to apply the principles of law recognized in criminal trials in the United States district courts." While I agree with that statement as far as it goes, the statement is flawed in that the United States district courts have no capital punishment principles to apply. Congress has not passed any federal legislation establishing *Furman*-type factors for federal capital offenses in general, but has for the specific crimes of aircraft piracy and espionage by military personnel; but in doing so, specified the aggravating factor(s) that had to be found before death could be imposed.

Although the United States district courts must follow the *Furman* mandate when interpreting capital punishment



statutes, as must we, the district courts—despite the validity or invalidity of any substantive-procedural distinctions—cannot establish the aggravating factors where none have been enacted by the Congress. *See United States v. Harper,* 729 F.2d 1216 (9th Cir. 1984). Likewise, if a federal district court cannot effectuate an unconstitutional death penalty provision, neither can the President, pursuant to Article 36, which requires him to follow, insofar as practicable, the principles of law recognized in trials of criminal cases in United States district courts. Article 36, UCMJ.

Furthermore, Article 36's delegation is additionally limited by Article 56, UCMJ, for while giving authority to the President to prescribe maximum punishments, it does so in terms of non-capital offenses. That the President's authority to prescribe maximum punishments is limited to non-capital offenses is supported not only by the legislative history of Article 56 but in fact by the President's own past actions.[27] Since the inception of the UCMJ and the promulgation of the first Manual for Courts-Martial, the provisions relating to the maximum punishments authorized for particular offenses—the Table of Maximum

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[27]I recognize that the Court of Military Appeals in *United States v. Flucas,* 23 U.S.C.M.A. 274, 275, 49 C.M.R. 449, 450 (1975), held that the President acted with proper authority when, pursuant to Article 36, UCMJ, he established the "element" of knowledge for the offense of assault, he provided "an aggravating factor increasing the maximum permissible punishment 'when the victim has a particular status or is performing a special function.' Paragraph 207b, MCM 1969." I can, however, distinguish *Flucas* on one simple ground—the death penalty is so unique that it requires different treatment. As Justice Stewart stated in his concurring opinion in *Furman,* 408 U.S. at 306, 92 S.Ct. at 2760, 33 L.Ed.2d at 388:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Punishments in MCM 1951 and 1969—have never addressed the punishments authorized for those offenses described in the various articles that authorize the imposition of the death penalty, even where life imprisonment is a mandatory lesser sentence. Therefore, since offenses carrying the death penalty are capital offenses, the President does not have the authority to prescribe anything which might effect the maximums with regard to Article 118, most particularly the aggravating factors that determine whether one convicted of a capital offense is eligible for consideration of imposition of the death penalty. If the President could prescribe the aggravating factors which make a person eligible for imposition of the death penalty, he would place a maximum on all other situations wherein a death occurs as the result of a criminal act for which Congress has authorized the death penalty. He would thus act contrary to congressional intent and his authority under Article 56. *See Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *United States v. United Verde*, 196 U.S. at 207, 25 S.Ct. at 222; *United States v. McCormick*, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960). While it is true that such an action accrues to the benefit of some capital offenders, without the proper authority or specific guidance of Congress, the President not only usurps authority but places other capital offenders in jeopardy when Congress may not have intended such unequal classification.[28]

A further indication that Congress and not the President is the proper authority for prescribing the aggravating factors, and a recognition by Congress of its responsibilities in this arena, is the 1986 enactment of Article 106a, 10 U.S.C. § 906a. Not only did Congress establish espionage as a capital offense, it also set forth within the

[28]I also make no judgment on equal protection of the law questions such as that posed by appellant. I find it unnecessary to my resolution of this case.



statute itself, the aggravating factors that had to be found before imposition of the death penalty could be adjudged.[29] In that statute the Congress further delegated to the President the authority to prescribe other aggravating factors under Article 36.[30]

## VI.

## Summary

In summary, I find that the Article 118 provision authorizing the imposition of the death penalty is unconstitutional and therefore invalid because of *Furman* and its progeny. I further find that the President's attempt in 1984 to effectuate that invalid authorization by promulgation of the aggravating factors set forth in R.C.M. 1004(c) pursuant to the authority vested in him by Articles 36 and 56, as they presently exist, was ineffectual because such delegation was constitutionally impermissible in the first place, or was an improper delegation by the Congress in the second.

Accordingly, while I approve the findings, I would disapprove the death penalty as approved on review below as a matter of law and approve only so much of the sentence as provides for dishonorable discharge, life imprisonment, forfeitures of all pay and allowances and reduction to pay grade E–1.

[29]If Congress had tacitly approved or ratified R.C.M. 1004, as offered by the majority, why was it necessary for the Congress to set forth specific aggravating factors for Article 106a, UCMJ, a post-*Furman* statute?

[30]The propriety of that additional delegation is a matter for future resolution, if necessary.

U.S. COURT OF MILITARY APPEALS.

No. 63,044.
NMCMR 87-3856.
32 M.J. 252

UNITED STATES, APPELLEE,

v.

RONNIE A. CURTIS, LANCE CORPORAL,
U.S. MARINE CORPS, APPELLANT.

Argued Aug. 29, 1990.
Decided April 18, 1991.

Accused, a lance corporal in the United States Marine Corps, was convicted by general court-martial, Sebastian Gaeta, Jr., J., of premeditated murder of two victims, burglary of their home, and various other offenses, and was sentenced to death. The United States Navy-Marine Corps Court of Military Review, 28 M.J. 1074, affirmed. On mandatory review the United States Court of Military Appeals, Everett, Senior Judge, held that: (1) capital case procedure promulgated by President through rule was not invalid as impermissible extension of presidential power and did not violate separation of powers, although President prescribed aggravating factors to be considered in making death penalty determination through the Manual for Courts-Martial; (2) rule promulgated by President to provide procedure for capital cases was not facially unconstitutional; and (3) before death sentence adjudged by court-martial can be approved, Court of Military Review must determine: whether one or more valid aggravating



factors have been unanimously found by court-martial and that finding is factually and legally correct; if any corrective action results in setting aside any such finding, but leaves intact at least one aggravating factor, whether that error affected imposition of sentence; whether death sentence adjudged is disproportionate to other death sentences that have been imposed; and whether under all facts and circumstances of case death sentence is appropriate.

Sullivan, C.J., and Cox, J., filed concurring statements.

For Appellant: *Robert E. Morin* and *Lieutenant Commander John B. Holt*, JAGC, USN (argued); *Captain Arthur R. Philpott*, JAGC, USN, *Lieutenant Commander L. Saccoccio*, JAGC, USNR-R, *Lieutenant Commander Susan K. Milliken*, JAGC, USN, *Captain Dwight H. Sullivan*, USMCR, *Lieutenant Frederic D. Firestone*, JAGC, USNR, *Lieutenant Thomas E. Miro*, JAGC, USNR (on briefs).

For Appellee: *Major Thomas D. Miller*, USMC, and *Lieutenant Commander Lawrence W. Muschamp*, JAGC, USN (argued); *Commander Thomas W. Osborne*, JAGC, USN and *Lieutenant Colonel Joseph S. Uberman*, USMC (on briefs); *Lieutenant Scott A. Hagen*, JAGC, USNR.

Amici Curiae on behalf of Appellant: *Captain Richard W. Aldrich* (argued)—For Appellate Defense Division, USAF. *Ronald Meister* (argued); *Edward H. Shakin* (on brief)—For American Civil Liberties Union Foundation. *Captain Michael J. Berrigan* (argued); *Colonel Robert B. Kirby, Lieutenant Colonel Russell S. Estey, Captain Cynthia G. Wright* (on brief)—For Defense Appellate Division, U.S. Army. *Roger L. Stavis, Esq.* (argued); *Stephen J. Shapiro* and *Nicholas Kamillatos* (on brief)—For the Association of the Bar of the City of New York

Committee on Military Affairs and Justice. *Jeanelle Moseley* (law student) (argued); *Ronald F. Wright* (on brief); *Michelle Davis, Gaylynn Gee, Anne Shaw* (law students)—For Wake Forest University School of Law Clinical Appellate Program. *Steven H. Goldblatt* (on brief); *Kevin M. Hodges, Brian G. Holland, Juan Enrique Mejia* (law students)—For Georgetown University Law Center Appellate Litigation program.

Amici Curiae on behalf of Appellee: *Captain David G. Nix* (argued); *Colonel Joe R. Lamport* and *Colonel Robert E. Giovagnoni* (on brief); *Major Paul H. Blackwell, Jr.*—For Appellate Government Division, USAF. *Captain Jonathan F. Potter* (argued); *Colonel Alfred F. Arquilla, Lieutenant Colonel Daniel J. Dell'Orto, Captain Randy V. Cargill, Captain Stephen R. Henley* (on briefs); For Government Appellate Division, U.S. Army *Paul J. Larkin, Jr.* (argued); *William P. Barr* and *Edward S.G. Dennis, Jr.*, Assistant Attorneys General; *Andrew G. McBride,* Associate Deputy Attorney General (on briefs)—For U.S. Department of Justice. *Paul D. Kamenar* (argued); *Daniel J. Popeo* (on brief)—For Washington Legal Foundation.

*Opinion of the Court*

EVERETT, Senior Judge:

Appellant was sentenced to death by a general court-martial convened at Camp Lejeune, North Carolina. The issues now before us are whether the President was empowered to prescribe the procedure under which this sentence was adjudged and, if so, whether the rule he prescribed complied with constitutional requirements.

I

On April 14, 1987, Curtis used a pretext to obtain entry



to the home of his supervisor, First Lieutenant James Lotz. His purpose—apparently the result of perceived racial slurs and the imbibing of gin—was to kill Lotz. He carried out his objective with a knife, and then he killed Lotz' wife, Joan.

After being apprehended, appellant was charged with the premeditated murder of both victims, the burglary of their home, and various other offenses.[1] The convening authority referred the charges to trial as a capital case; and pursuant to RCM 1004, Manual for Courts-Martial, United States, 1984, the Government notified[2] the defense of the "aggravating factors" on which it would rely.

After the general court-martial found Curtis guilty as charged, the Government offered evidence as to these "aggravating factors": (1) that Lieutenant Lotz' murder was aggravated by the murder of his wife; (2) that Mrs. Lotz' murder was aggravated by the murder of Lieutenant Lotz; and (3) that Mrs. Lotz' murder occurred during a burglary,[3] to wit: breaking and entering into the Lotz home

[1]These offenses included larceny of the knife he used to kill the Lotzes; larceny of their automobiles; and indecent assault on Mrs. Lotz after he had stabbed her. These offenses were in violation of Articles 118, 129, 121, and 134, Uniform Code of Military Justice, 10 USC §§ 918, 929, 921, and 934, respectively.

[2]At trial the defense questioned the validity of the notice because it only listed two "aggravating circumstances," namely: "a. The murder of Joan M. Lotz was committed while the accused was engaged in the commission of a burglary; and b. The accused . . . has been found guilty in the same case of another violation of Article 118." The defense objected to three factors being listed in the instructions and on the sentence worksheet when they were notified of only two. While the judge found the defense was not misled by the notice, it would be advisable for the notice to be precise as to what factors are being relied on for each specification which carries the death penalty.

[3]The Government relied on a "constructive breaking" by means of a pretext. *See* para. 55c(2), Manual for Courts Martial, [sic] United States, 1984. Curtis had come to the Lotz home at 2:00 a.m. and had pretended that another Marine had been in an accident. Lieutenant Lotz invited Curtis in while he phoned for assistance. While Lotz was phoning, appellant stabbed him.

at night with the intent to commit murder. The general court-martial adjudged the death sentence, which the convening authority approved. Thereafter, the Court of Military Review reviewed the case *en banc* and unanimously affirmed the findings of guilty. 28 MJ 1074 (1989). However, Chief Judge Byrne dissented from affirmance of the death sentence, which he concluded was not appropriate in this case (*id.* at 1095–96); and Judge Albertson dissented from affirmance of the sentence because she believed that RCM 1004 was unconstitutional. *Id.* at 1096–1113.

The case reached this Court for mandatory review. *See* Art. 67(a)(1), Uniform Code of Military Justice, 10 USC § 867(a)(1) (1989). After considering the briefs submitted by the parties, as well as various motions, we concluded that two issues—which were discussed extensively in the Court of Military Review, raised in this Court, and are common to any capital case tried by a court-martial—should be separately considered and argued. These issues were:

I

WHETHER THE CAPITAL PUNISHMENT PROCESS UNDER WHICH APPELLANT WAS SENTENCED TO DEATH IS INVALID BECAUSE IT IS AN IMPERMISSIBLE EXTENSION OF PRESIDENTIAL POWER.

II

WHETHER RULE FOR COURTS-MARTIAL 1004 IS UNCONSTITUTIONAL ON ITS FACE.

Thereafter, we received supplemental briefs from the parties and from various amici curiae and then heard



extensive oral argument. Aided by the excellent briefs and argument, we now have concluded that the President acted within his powers in promulgating RCM 1004 and that this Rule otherwise satisfies constitutional requirements.

II

A

The Constitution, on its face, does not single out capital cases for special treatment. This point was made in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)—overruling *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), which had drawn a distinction between capital and noncapital cases. Likewise, in *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960), the Supreme Court rejected the attempt by Justices Frankfurter and Harlan to draw a line between capital and noncapital cases with respect to military jurisdiction over civilian defendants abroad.

The Supreme Court, however, has now made clear that the Eighth Amendment requires a different treatment of death-penalty cases. Thus, in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), a majority of the justices agreed that the arbitrary and capricious imposition of capital punishment—which, in their view, characterized most state procedures—violated the Eighth Amendment. *Cf. Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Likewise, in applying double jeopardy protections, a capital case is treated differently from other cases. *Cf. Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

We observe, also, that in practice, the issues raised by capital cases occupy a significant amount of the time spent

by appellate courts. Thus, in its 1989 term, nine cases decided by the Supreme Court were capital.[4] The collateral attacks and multiple reviews in capital cases have posed problems of judicial administration which have troubled Congress, the Supreme Court, the legal profession, and the public.

In regulating military justice, Congress has exhibited a special concern for capital cases. Most of the punitive articles of the Uniform Code of Military Justice provide that a convicted person "shall be punished as a court-martial may direct"; and only for a few crimes—such as wartime desertion, mutiny, sedition, espionage, murder, and rape—is a court-martial empowered to impose "death or such other punishment as a court-martial may direct." *See, e.g.,* Arts. 85(c), 94(b), 106a(a)(1), 118, and 120(a), UCMJ, 10 USC §§ 885(c), 894(b) 906a(a)(1), 918, and 920(a), respectively.[5] Article 45(b) of the Uniform Code, 10 USC § 845(b), prohibits a guilty plea in a capital case. Article 49(f), UCMJ, 10 USC § 849(f), limits use of depositions in capital cases. The third clause of Article 134, UCMJ, 10 USC § 934, incorporates the federal criminal code into military justice, but it only does so with respect to "crimes and offenses not capital."

B

In *United States v. Matthews,* 16 MJ 354 (CMA 1983),

[4] *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255; *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316; *Butler v. McKellar,* 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347; *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369; *Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415; *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725; *Whitmore v. Arkansas,* ___ U.S. ___, 110 S.Ct. 1717, 109 L.Ed.2d 135; *Walton v. Arizona,* ___ U.S. ___, 110 S.Ct. 3047, 111 L.Ed.2d 511; *Lewis v. Jeffers,* ___ U.S. ___, 110 S.Ct. 3092, 111 L.Ed.2d 606.

[5] For premeditated murder or felony murder, the punishment imposable under Article 118 is "death or imprisonment for life."



this Court considered the constitutionality of the sentencing procedure then prescribed for capital cases by the Manual for Courts-Martial. In some respects, this procedure met the requirements which we held had been established by *Furman v. Georgia, supra,* and succeeding Supreme Court cases—requirements which we concluded were applicable to courts-martial. For example, trials by courts-martial are bifurcated—the sentencing proceedings being separate from the adjudication of guilt. The accused has unlimited opportunity to present mitigating and extenuating evidence, which the military judge must identify to the court members for their deliberations on sentence. Moreover, mandatory review of the facts, the law, and the appropriateness of sentence is provided in death cases—as well as in most other cases tried by general court-martial.

The principal defect that *Matthews* identified in the military justice system was that neither the Uniform Code of Military Justice nor the Manual for Courts-Martial required the court-martial members to "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty." 16 MJ at 379. Thus, upon appellate review, it was impossible to assure that a death penalty adjudged by a court-martial reflected "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Ibid,* quoting *Zant v. Stephens,* 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983).

In *Matthews,* we ruled that either Congress or the President could "take [corrective] action to remedy" the "defect that now exists in the sentencing procedure employed by courts-martial in capital cases." 16 MJ at 380. The majority of this Court concluded that, if new sentencing procedures were authorized, they could be

applied retroactively for resentencing Matthews or other servicemembers as to whom death sentences had been adjudged. *Cf. Dobbert v. Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Indeed, we ruled in *Matthews* that if the President or Congress prescribed constitutionally valid procedures for imposing the death penalty within 90 days after we issued our mandate, the new procedures could be used in resentencing the accused. 16 MJ at 382.

Within the 90-day period that had been allowed by this Court, President Reagan amended the Manual for Courts-Martial to provide a new procedure for capital cases. Exec. Order No. 12,460, 49 Fed.Reg. 3169 (1984). However, this amendment, by its own terms (§ 6), was prospective in application and was not intended to apply to Matthews or any other servicemember whose case had already been tried.

The death penalty procedure authorized by the President in January 1984 became RCM 1004 in the Manual for Courts-Martial, United States, 1984. When Congress amended the Uniform Code in 1985 by adding Article 106a—Espionage, and authorized the death penalty for this crime, RCM 1004 was amended to specify some additional "aggravating factors" for members of a court-martial to consider in deciding on a death penalty. § 1k(4), Exec. Order No. 12,550, 51 Fed.Reg. 6497, 6498 (1986).

We are now asked by appellant to reconsider our conclusion in *Matthews* that the President may constitutionally define the circumstances under which a death penalty may be imposed by a court-martial. Furthermore, appellant maintains that, in its present form, RCM 1004 is unconstitutional on its face.



III

A

RCM 1004, which is captioned "Capital cases," currently provides:

> (a) In general. Death may be adjudged only when:
>
> (1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and
>
> (2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and
>
> (3) The requirements of subsections (b) and (c) of this rule have been met.
>
> (b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—
>
> (1) *Notice.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar

later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.

(3) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.

(4) *Necessary findings.* Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.

(5) *Basis for findings.* The findings in subsection (b)(4) of this rule may be based



on evidence introduced before or after findings under R.C.M. 921, or both.

(6) *Instructions.* In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) *Announcement.* If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a

reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118 or 120;

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;



(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)-(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil.R.Evid. 315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;



(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing;

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offenses:

(11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of

death to a person other than the individual who was the victim.

For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) *Spying.* If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) *Other penalties.* Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it. (Discussion omitted.)



B

If "aggravating factors" used in channeling the discretion of the sentencing authority in death cases were elements of the crime, we would have no choice but to hold that they must be set forth by Congress and cannot be prescribed by the President. Consistent with Article I of the Constitution, only Congress has the power to legislate; and definition of the elements of a crime clearly is legislation. However, the Supreme Court has made clear that "aggravating factors" are not "elements" of a crime. *Cf. Walton v. Arizona,* 497 U.S. ___, ___ 110 S.Ct. 3047, 3054–55, 111 L.Ed.2d 511, 525 (1990). For this reason a defendant has no right to a jury trial as to the existence of aggravating factors, and the sentencer's rejection of a particular circumstance is not an "acquittal" of that circumstance for double jeopardy purposes. Cf. *Poland v. Arizona,* 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986).

Is it consistent, then, with the separation of powers required by the Constitution for the President to prescribe these "aggravating factors"? The recent decision of the United States Supreme Court in *Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), provides us with guidance.

There the Court considered the constitutionality of sentencing guidelines issued by the Sentencing Commission, which is chaired by a Federal circuit judge and has other judges among its members. The defendant complained that the commission and its guidelines were unconstitutional because promulgation of guidelines was a legislative task which should have been performed by Congress and because "the separation of powers doctrine" was violated by allowing active members of the judiciary

to serve on the commission. However, the Supreme Court concluded, over Justice Scalia's vigorous dissent, that establishment of the commission had not violated separation-of-powers requirements and that the guidelines had been constitutionally promulgated.[6]

In *Mistretta,* the Court seemed willing to allow considerable flexibility and innovativeness in the allocation of power among governmental institutions. Apparently its chief concern was that one branch of Government not aggrandize itself at the expense of another. However, in *Mistretta* this fear was allayed because Congress had established the Sentencing Commission and had defined the task which it wished the Commission to perform. A year before the Court took a similar tack in upholding legislation which provided for an Independent Counsel. *Morrison v. Olson,* 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

Unlike an Independent Counsel or members of the Sentencing Commission, the President holds an office specifically authorized by the Constitution. Moreover, he has been invested by the Constitution with the "executive Power," Art. II, § 1, and is the Commander-in-Chief of the Armed Forces. Art. II, § 2. In view of his inherent constitutional authority, a separation-of-powers objection has much less merit in the present context than if the "aggravating factors" for capital cases tried by courts-martial had been formulated by a specially created commission.

We are mindful, however, of the separation-of-powers analysis in Justice Jackson's often cited concurring opinion

[6]In footnote 11 of its opinion in *Mistretta,* the Supreme Court discussed the Sentencing Commission's authority with respect to the death penalty. 488 U.S. 361, 378, 109 S.Ct. 647, 657-58, 102 L.Ed.2d 714 (1989).



in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). There, in dealing with the seizure of steel mills during the Korean War, Justice Jackson suggested that the President's power is the greatest when he acts under a specific delegation from Congress; is less when he acts without delegation, but as to a subject concerning which Congress has not legislated; and is the least when he acts on the basis of his inherent constitutional authority and against the express or implied wishes of Congress. *See* 343 U.S. at 635–38, 72 S.Ct. at 870–72. Presidential power to prescribe the "aggravating factors" in RCM 1004 is more sustainable if it has been expressly or implicitly conferred by Congress, or if Congress, at least, has displayed no desire to legislate in this field and a willingness to let the President take action.

It is clear that Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial. Most of the punitive articles in the Uniform Code provide that a convicted accused "shall be punished as a court-martial may direct." Under Article 56, UCMJ, 10 USC § 856, "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Article 18, UCMJ, 10 USC § 818, states that a general court-martial "may, *under such limitations as the President may prescribe,* adjudge any punishment not forbidden by [the Code], including the penalty of death when specifically authorized by" the Code. (Emphasis added.) When these Articles are taken together, they reveal that—instead of legislating maximum punishments as it has done in Title 18 of the United States Code for cases tried in the District Courts—Congress has decided that the President shall set the maximum punishments imposable in trials by courts-martial.

Consistent with Articles 18 and 56 of the Code—and previously with comparable provisions of the Articles of

War—the President for several decades prescribed maximum punishments in a Table of Maximum Punishments as part of the Manual for Courts-Martial. The current Manual sets the maximum punishments in subparagraph e for each paragraph in Part IV devoted to a particular offense.[7] In some instances, this Table and now the Manual text provide that a maximum punishment is increased because of aggravating circumstances. For example, driving while drunk carries a heavier penalty if it results in death. Para. 35e(1), Part IV, 1984 Manual, *supra*. Desertion terminated by apprehension authorizes a higher maximum punishment than desertion terminated by surrender. Para. 9e(2). The maximum punishment for larceny depends on the value of the property stolen. Para. 46e(1). And so on.

Thus, under a power delegated by Congress, the President has for many years been prescribing aggravating circumstances that would increase the punishment imposable for various offenses tried by courts-martial. Presumably, Congress has been well aware of his exercise of this power because, under Article 36(b) of the Uniform Code, 10 USC § 836(b), the rules and regulations prescribed by the President for courts-martial—including, of course, the maximum punishments—must be reported to Congress.

Since 1951 death penalties have been authorized by several punitive articles of the Uniform Code, and previously they had been permitted by the Articles of War and the Articles for the Government of the Navy. Furthermore, Congress has never displayed any intent to rescind them.

In 1983, when this Court decided *Matthews*, we held that either Congress or the President could prescribe

[7] Appendix 12 of the Manual lists maximum punishments, but it is not authoritative.



"aggravating factors" for death cases in courts-martial. 16 MJ at 380–81. In view of our analysis in *Matthews*, it should have been apparent that, unless these aggravating factors were prescribed by one branch of government or the other, courts-martial would be precluded from adjudging death penalties.

When, after our *Matthews* decision the President prescribed a new sentencing procedure for death cases, his action was promulgated by the Executive Order No. 12460, *supra*, which gave notice to Congress and the public at large. We are unaware of any indication of legislative displeasure with the President's action or any legislative effort at that time to undo his action or to curtail the use of capital punishment in courts-martial.

In 1985, Congress enacted legislation which we interpret to be an affirmation of presidential power to prescribe "aggravating factors" for capital cases. The Uniform Code was amended by the addition of Article 106a, which prohibited espionage and authorized punishment "by death or such other punishment as a court-martial may direct." Art. 106a(a)(1). In connection with its death penalty, Article 106a provided:

> (b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—
>
> (A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and
>
> (B) the members unanimously determine that any extenuating or mitigating

circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out in subsection (c).

(2) Findings under this subsection may be based on—

(A) evidence introduced on the issue of guilt or innocence;

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.



(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

(4) *Any other factor that may be prescribed by the President by regulations under section 836 of this title (article 36).*

Pub.L. No. 99–145, title V, § 534(a), 99 Stat. 634 (1985) (emphasis added).

Two features of this legislation are noteworthy. First, the procedure prescribed by Article 106a conforms generally to the procedure which the President previously had prescribed in RCM 1004. Secondly, the President is specifically authorized by Article 106a(c)(4) to prescribe other "aggravating factors" in addition to the three that are set forth in Article 106a(c)(1)-(3). This authority is linked in (c)(4) of that Article to the power granted him by Article 36(a) of the Uniform Code to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof," for trials by courts-martial.[8]

In connection with the provision for death-penalty sentence proceedings in Article 106a, H.R. Conference Report No. 235, 99th Cong., 1st Sess., states:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provision of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not

[8]Under Article 36(b), UCMJ, 10 USC § 836(b), the rules and regulations promulgated under Article 36(a) "shall be reported to Congress."

> intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards *that already exist for the other capital punishment articles.*

DOD Authorization Act of 1986, Pub.L. No. 99–145, 1985 U.S.Code Cong. & Admin. News, 571, 579 (emphasis added). If failure of Congress to complain about the content of regulations can be construed to be ratification, cf. *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, AFL-CIO*, 367 U.S. 396, 408–09, 81 S.Ct. 1529, 1535–36, 6 L.Ed.2d 924 (1961), the provisions of Article 106a—along with its legislative history—are even clearer evidence of ratification.

As heretofore mentioned, the Supreme Court has made clear its concern that one branch of government not grab any power which the Constitution has conferred on another branch. *Cf. Mistretta* and *Morrison*, both *supra; Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). By implication Article 106a affirms that Congress does not consider the President's prescribing "aggravating factors" to be in diminution of its own legislative power. Instead, Congress undoubtedly has concluded that, in view of the major role that for decades it has delegated to the President in prescribing limitations on maximum punishment, it is better for the President to prescribe "aggravating factors" by Executive Order than for Congress to attempt to do so by statute.[9]

[9]Since we conclude that Congress has—at least, implicitly—delegated this task to the President, we need not consider what inherent authority the President would have in this area. For example, absent any indication of congressional willingness for him to prescribe "aggravating factors," could the President constitutionally do so? Also, what if Congress attempted to block exercise of this power by the President?



C

To the extent we rely on delegation from Congress as a source of presidential power, we are confronted by appellant's argument that Congress failed to prescribe standards for the exercise of the delegated power. *Cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). Certainly Congress did not give the President guidance as explicit as that which the Sentencing Reform Act prescribed for the Sentencing Commission. Indeed, Justice Scalia, the sole dissenter in *Mistretta*, perceived no delegation problem in the creation of that Commission and was concerned chiefly with the claimed violation of separation-of-powers principles.

However, in prescribing "aggravating factors" the President was not left totally without guidance from Congress. Article 106(a)(c)(4) refers to regulations prescribed by the President under Article 36—which, in turn, directs that the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with" the Uniform Code. *See* Art. 36(a). Apparently Congress wished the President to look to the "principles of law" applied in federal criminal cases in determining what should be the "aggravating factors" for capital cases tried by court-martial. Furthermore, as we examine the"aggravating factors" prescribed by the President in RCM 1004, we find that they reflect policy expressed by Congress in various statutes—including several punitive articles of the Uniform Code of Military Justice—and also conform generally with the Model Penal Code and with policies expressed in the

statutes of many of the 36 states which authorize the death penalty.[10]

"Aggravating factor" (1) is commission of the offense "before or in the presence of the enemy." Article 99 of the Code, 10 USC § 899, authorizes death for nine types of misbehavior "before or in the presence of the enemy," and thereby it reflects a legislative judgment that such conduct is very harmful to the military mission.

"Aggravating factor" (2)(A) corresponds to an "aggravating factor" prescribed by Congress for espionage offenses, *see* Art. 106a(c)(2); and "Aggravating factors" (2)(B) and (3) also correlate with the manifest congressional concern about espionage—a crime for which death is authorized by Article 106a(a)(1) of the Code. *See also* 18 USC § 794.

"Aggravating factor" (4) parallels an "aggravating factor" prescribed by Article 106a(c)(3) and reflects special concern if the crime for which the accused has been convicted created a grave risk of death to others. This "aggravating factor" has parallels in many state statutes authorizing the death penalty.[11]

"Aggravating factor" (5)—which involves commission of the offense "with the intent to avoid hazardous duty"—reflects legislative disapproval of flight from hazardous duty. Thus, desertion with intent to avoid hazardous duty authorizes the death penalty in time of war, *see* Art.

[10] *See Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2975 n.2, 2976 n.4, 2978 n.5, 106 L.Ed.2d 306 (1989), for a collection of federal and state statutes concerning the death penalty.

[11] *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246, 260 (1988); *Jones v. State*, 520 So.2d 543, 551–52 (Ala. 1988); *Stouffer v. State*, 738 P.2d 1349, 1361 (Okl.Cr. 1987); *Hogan v. State*, 103 Nev. 21, 732 P.2d 422, 424 (1987); *Way v. State*, 496 So.2d 126, 128 (Fla. 1986).



85(a)(2) and (c); and running away from the enemy or cowardly conduct also permits a death penalty, *see* Art. 99(1) or (5).

"Aggravating factor" (6)—which applies to murders and rapes in time of war—deals with conduct which violates the law of war; and thereby threatens international relations. The death penalty is not unusual for violations of the law of war; *see, e.g., In re Yamashita*, 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946)[12]; *Ex Parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed.3 (1942); and perhaps the constitutional restrictions derived from *Furman* may not even apply to such violations. *Cf. Yamashita* and *Quirin*.

"Aggravating factor" (7)—applies only to premeditated murder in violation of Article 118(1) and is the only "aggravating factor" involved in appellant's case. This "aggravating factor" has ten subparts. As explained in the Drafters' Analysis of this rule, *see* Manual for Courts-Martial, United States, 1984, at A21–66 (Change 2), these "aggravating factors" were to a considerable extent derived from those contained in the state statutes enacted in response to *Furman v. Georgia, supra*.

Factor (7)(A) applies to an accused "serving a sentence of confinement for 30 years or more or for life at the time of the murder." This factor is intended to express disapproval of premeditated murder by an accused who has already been convicted of a very serious crime. Also, it may provide an additional deterrent for someone who might only be deterred by the death penalty.

[12] Article 106, UCMJ, 10 USC § 906, which is based on the law of war, applies not only to servicemembers but also to civilians. Whether its mandatory death penalty is constitutional is open to question. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

Factor (7)(B) is that the premeditated murder occurred "while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense."

Congress has severely condemned all of these crimes. Under Article 118(4), murder committed in the course of "burglary, sodomy, rape, robbery, or aggravated arson" permits a death sentence and requires at least life imprisonment. Mutiny and sedition are themselves capital offenses under Article 94. Piracy long has been viewed as a universal offense against the law of nations and is specifically mentioned in Article I, § 8, cl. 10 of the Constitution. Congress has prescribed the death penalty for skyjacking under certain circumstances—49 USC App § 1472(i)(1)(B) (aircraft piracy resulting in death authorizes the death penalty).[13] Kidnapping also is severely condemned by the Federal criminal code, 18 USC § 1201(a)—although the death penalty, which at one time Congress authorized for this crime, was subsequently held unconstitutional in *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

Factors (7)(C), (7)(D), and (7)(E)—which involve, respectively, murder "for the purpose of receiving" something of value, "procur[ing] another . . . to commit the murder," or committing the murder "to avoid or to prevent lawful apprehension or effect an escape"—have counterparts in many state statutes. *See, e.g., Ariz. Rev. Stat. Ann.* 13–703(F)(5) (Supp. 1988) (which includes as a factor that the homicide was committed with the expectation of receiving something of value); *see also Walton v. Arizona,* ___ U.S. ___, 110 S.Ct. 3047, 3051, 111 L.Ed.2d 511 (1990). Of course, resistance of apprehension and escape are offenses under the Uniform Code. *See* Art. 95, 10 USC § 895.

[13] Whether the authorized penalty of death if the death of another person occurs as a result of the air piracy is constitutionally sustainable may be questioned since the statute requires no specific findings of aggravation and specifies no aggravating factors.



"Aggravating factor" (7)(F)—concerns the official status or duties of the victim, and it corresponds with recent legislation seeking to protect various public officials. *See, e.g.,* 18 USC §§ 351 and 1751.

Factor (7)(G) centers on the victim's execution of his military office or his duties, military or civilian, in law enforcement, security, or firefighting. At least to some extent, this "aggravating factor" recognizes a congressional intent to protect persons performing duties important to public safety. *Cf.* 18 USC § 1114; Arts. 90 and 91, UCMJ, 10 USC §§ 890 and 891, respectively

"Aggravating factor" (7)(H) concerns "intent to obstruct justice." Obstruction of justice is a recognized federal crime. 18 USC §§ 1501–15. In military practice obstruction or interference with the administration of justice is not limited to those acts enumerated in the federal criminal code—*United States v. Jones,* 20 MJ 38, 40 (CMA 1985); *United States v. Long,* 2 USCMA 60, 6 CMR 60 (1952); but under the facts here we need not decide which definition should be applied to the act alleged to have aggravated the offense.

"Aggravating factor" (7)(I) resembles an "aggravating factor" in many state statutes for murders described as "heinous, atrocious, or cruel" or in similar terms. However, unlike the state statutes—which have sometimes

been successfully attacked as vague—*see Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); and have required limiting judicial construction, *cf. Walton v. Arizona, supra*—this ''aggravating factor'' is stated clearly in RCM 1004.

''Aggravating factor'' (7)(J) is ''another violation of Article 118''—*i.e.,* another murder—''in the same case.'' Since any violation of Article 118 has a maximum punishment either of death or of life imprisonment, this ''aggravating factor'' is predicated on conduct viewed quite seriously by Congress. Likewise, in many state statutes, a second murder is an ''aggravating factor.''[14]

''Aggravating factor'' (8) applies only in the case of a violation of Article 118(4), and so relates only to felony murders. We have held that an accused may be convicted of murder under Article 118(4) even though he did not kill the victim and only aided and abetted commission of the felony on which the felony-murder conviction was based. *United States v. Jefferson,* 22 MJ 315 (CMA 1986). The Supreme Court has concluded that the Eighth Amendment is violated when a defendant is sentenced to death for a felony murder if he did not participate actively in the killing. *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *but cf. Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (upholding a death penalty for an accused who did not kill the victim, but whose conduct was related to the killing).

''Aggravating factor'' (9) applies only to a violation of Article 120—which authorizes a death penalty for rape. In

[14] *See Townsend v. State,* 533 N.E.2d 1215, 1229 (Ind. 1989); *Wallace v. State,* 486 N.E.2d 445, 463 (Ind. 1985); *Hightower v. State,* 259 Ga. 770, 386 S.E.2d 509, 511 (1989); *State v. Sloan,* 756 S.W.2d 503, 509, 511 (Mo. banc 1988).



*Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court held that executing a defendant for rape of an adult female would violate the Eighth Amendment. We intimated in *Matthews* that this same principle would apply to trials by courts-martial, ''at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense.'' 16 MJ at 380.

This ''factor'' seeks to comply with *Coker* by permitting the death penalty only if ''[t]he victim was under the age of 12'' or if ''[t]he accused maimed or attempted to kill the victim.'' Congress has manifested its intent that young females be protected from sexual intercourse by creating the offense of carnal knowledge, whereunder a servicemember may be punished for consensual intercourse with a female under 16. Also, Congress has prohibited both maiming, *see* Art. 124, UCMJ, 10 USC § 924, and attempted murder, *see* Art. 80, UCMJ, 10 USC § 880, and Art. 118.

''Aggravating factor'' (10) applies to conduct for which ''death is authorized under the law of war.'' The law of war—which is part of the ''Law of Nations'' within the meaning of Article I, § 8, cl. 10 of the Constitution—provides a separate basis of military jurisdiction from that which exists under Article I, § 8, cl. 14, on which the Uniform Code is based. *In re Yamashita* and *Ex Parte Quirin,* both *supra.* Violations of the law of war may be tried by general court-martial, *see* Art. 18, or by a military commission or some other type of military tribunal. *Cf.* Arts. 104 and 106, UCMJ, 10 USC § 904 and 906, respectively; *In re Yamashita* and *Ex Parte Quirin,* both *supra; Madsden v. Kinsella,* 343 U.S. 341, 72 S.Ct. 699, 96 L.Ed. 988 (1952). If the line of decisions beginning with *Furman v. Georgia, supra,* applies to violations of the

law of war and if an aggravating factor must be established to permit imposition of the death penalty for those violations, it seems appropriate that one "aggravating factor" should be that the law of war recognizes the seriousness of the conduct involved by authorizing the punishment of death.[15]

"Aggravating factor" (11) applies only to violations of Article 104—aiding the enemy—or of Article 106a—espionage. The first alternative is that "[t]he accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute." Here again, aggravation is found in conduct which Congress has condemned by authorizing punishment of death or life imprisonment.

The other alternative is based on the language of Article 106a(c)(3), whereunder an aggravating factor for the offense of espionage is that "the accused knowingly created a grave risk of death to another person."[16]

From our examination of the "aggravating factors" formulated by the President in RCM 1004, it seems clear that, to a considerable extent the President acted in reliance on legislative policy expressed in the Uniform Code of

[15] Article 18, UCMJ, 10 USC § 818, authorizes either general courts-martial or other military tribunals to administer the law of war.

[16] Indeed, the language used in the Rule, which adverts to "grave risk of death to a person other than the individual who was the victim," seems to suggest that, in order for this aggravating factor to apply, the accused not only must have been convicted of aiding the enemy or espionage, but also must have killed one person "who was the victim" and placed in great danger someone else. We doubt that this additional restriction was intended. Nevertheless, since, in describing this "aggravating factor," the President did not use the language, "the victim, if any"—as he did for "aggravating factor" (4)—"aggravating factor" (11)(B) must contemplate a "victim" apart from the person placed at risk.



Military Justice and in other federal statutes. This is especially true with respect to "aggravating factor" (7) and its various subparts—which were utilized in adjudging the death penalty in the present case. To the extent the President went outside federal statutes for guidance, he drew upon the Model Penal Code—which has been a source of decisional guidance in military justice, *see, e.g., United States v. Byrd,* 24 MJ 286 (CMA 1987); *United States v. Frederick,* 3 MJ 230 (CMA 1977); *United States v. Thomas,* 13 USCMA 278, 32 CMR 278 (1962)—and upon patterns discerned in state death-penalty legislation.

We note also that RCM 1004 is more specific in prescribing aggravating factors than is true of many state statutes. It does not use terms like "heinous," "vile," "atrocious," and "cruel"—which present issues of vagueness and necessitate extensive judicial construction. *See, e.g., Walton v. Arizona, Maynard v. Cartwright,* and *Godfrey v. Georgia,* all *supra.* Thus, the "aggravating factors" under RCM 1004 are easier to apply than some civilian counterparts.

As has already been emphasized, the "aggravating factors" which President Reagan prescribed in January 1984 and which were incorporated in Manual for Courts-Martial, United States, 1984, were known to Congress. In enacting Article 106a in 1985, Congress specifically authorized the President to prescribe "aggravating factors" for espionage prosecutions in addition to those prescribed by Congress. Art. 106a(c)(4). We interpret this express congressional delegation to signify approval of the standards which the President theretofore had employed in prescribing "aggravating factors" for use in capital cases. RCM 1004(c).

Although the guidance provided by Congress to the President was not so specific as that which Congress gave

to the Sentencing Commission, *see Mistretta v. United States, supra,* the President was not set adrift in an uncharted sea. Instead, in prescribing "aggravating factors," he was guided by the Uniform Code and other federal legislation and by a pattern of legislative intent discernible in the state statutes. Moreover, Congress not only acquiesced in his performance of this task but also tacitly ratified the "aggravating factors" when it enacted Article 106a of the Uniform Code.

IV

Appellant has vigorously attacked the constitutionality of RCM 1004, as promulgated by the President. He claims that the Rule should require the court-martial to have at least 12 members at all times.[17] Appellant recognizes that courts-martial are not subject to the jury-trial requirements of the Sixth Amendment, *see Ex parte Quirin,* 317 U.S. at 39–45, 63 S.Ct. at 16–19; but he reasons that to allow a death penalty to be imposed by less than 12 members violates the Eighth Amendment. His premise is that, even though juries in state courts are not required constitutionally to have 12 members, *see Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), those states in which juries do participate in imposing the death penalty use 12-member juries for this task. Moreover, the Supreme Court has recognized that the number of jurors is related somewhat to the reliability of their decision, and therefore no state jury may be reduced below 6 in number without violating due process. *Ballew v. Georgia,* 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978). Appellant claims that, if there are at least 12 court-martial members, there will be an input of diverse viewpoints, so that any decision on imposing capital punishment is less likely to be arbitrary or capricious.

[17]In appellant's case, there were originally 15 members of the court-martial, but after challenges the number was reduced to 9.



The defense concedes that a civilian judge alone may be entrusted with imposing the death sentence, *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Walton v. Arizona, supra;* and he may even be empowered to override a jury recommendation for life imprisonment. *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). However, appellant points out that a judge has a professional background which qualifies him for his sentencing task, while court-martial members lack similar experience.

Under RCM 1004, the court-martial members—who have been chosen pursuant to the criteria set forth in Article 25 of the Code, 10 USC § 825—must be unanimous in finding aggravating factors.[18] The military judge can, at least, recommend a commutation of a death sentence adjudged;[19] and the convening authority is empowered to commute the sentence. Furthermore, a Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence. In view of all these safeguards, we are not convinced that a court-martial must have 12 members in a capital case when this is not required in any other type of trial.

Under RCM 1004, the members must unanimously find at least one of the listed aggravating factors. Unlike the procedure under some state statutes upheld by the Supreme Court, *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), there is no "aggravating

[18]Unanimity is not always required by state law. *See Jackson v. State,* 530 So.2d 269, 271 (Fla. 1988)—the vote to recommend the death penalty was 7–5; *Parker v. State,* 476 So.2d 134 (Fla. 1985)—the vote was 8–4.

[19]We need not decide now whether the military judge is himself empowered to set aside a death sentence that he considers disproportionate or otherwise defective.

factor'' which *compels* the sentencing authority to impose the death sentence.[20] Instead, all the court-martial members must ''concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances. . .including the factors under'' RCM 1004(c). RCM 1004(b)(4)(C).

The defense seems to complain that RCM 1004 does not prescribe any mitigating factors to be found by the members of the court-martial. However, by omitting provision for such findings, this rule avoids the problem posed in *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and in *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). There the instructions of the trial judge were construed by the Supreme Court to mean that a mitigating factor could not be considered at all unless all the jurors concurred in finding that it existed. Thus, such an instruction might enable a juror who wanted the death penalty imposed to hold out against any findings that mitigating factors existed. Instead, RCM 1004 allows an accused broad leeway to bring to the attention of the court-martial members any information which he believes would mitigate his sentence. *Cf. Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Appellant has contended that RCM 1004 is defective because it lacks any provision to prevent racial bias—like that included in a recently enacted federal anti-drug statute. Section 848(*o*) of Title 21, USC, requires that, in a drug case where the death penalty is authorized, the jury be instructed not to ''consider the race, color, religious

[20] If the President had attempted to require that a death sentence be adjudged if an ''aggravating factor'' were found, we believe he would clearly have exceeded his constitutional authority.



beliefs, national origin, or sex of the defendant or the victim.'' This statute did not become effective until after appellant's trial (102 Stat. 4545) and, by its own terms, applies only to jury trials in federal district courts. Its requirements—however desirable they may be[21]—are not constitutionally mandated; otherwise, the Supreme Court would have applied them to capital cases tried by state courts.[22]

Appellant contends that court-martial members would be misled by the sentencing procedure, because they must find ''any aggravating factors'' but they do not make findings as to ''mitigating factors.'' His assumption is that, if one or more ''aggravating factors'' are found and no ''mitigating factors'' are specifically found, the members will inevitably conclude that the ''aggravating factors'' substantially outweigh the ''mitigating factors.'' Under this view, the President's attempt to allow the members the maximum leeway to consider mitigating evidence—in compliance with the principles announced in *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Lockett v. Ohio, supra*—is deemed to be a vice rather than a virtue. While there might be some advantages in the procedure urged by the defense for finding mitigating factors, there also can be disadvantages—as evidenced by *McKoy v. North Carolina* and *Mills v. Maryland,* both *supra.* We believe that the President made a constitutionally permissible choice.

The defense insists that RCM 1004 should require a separate finding by the members that ''any extenuating or

[21] The military judge could give such instructions *sua sponte* or if requested by the defense. Such an instruction certainly seems desirable.

[22] Curtis, who is black, was tried by a panel which included several blacks. Despite his claim that he had killed Lieutenant Lotz in a rage provoked by the victim's racial prejudice, the members voted unanimously for the death penalty.

mitigating circumstances are substantially outweighed by any aggravating circumstances." We are convinced, however, that the weighing of aggravating against mitigating factors can be adequately handled by instructions to the members that they must all concur as to this imbalance and does not require a separate finding. *United States v. Evans*, 27 MJ 34, 40 (CMA 1988), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 797, 102 L.Ed.2d 788 (1989). Such instructions were given here.

In sum, as we construe RCM 1004, it not only complies with due process requirements but also probably goes further than most state statutes in providing safeguards for the accused.

V

This case provides an example of matters that must be considered during appellate review before a death sentence can be approved. Here, one of the "aggravating factors" found by the court-martial was that Mrs. Lotz had been killed by appellant in the perpetration of a burglary. However, two other "aggravating factors" were submitted to the members. Specifically, the members found:

> PRES: Lance Corporal Ronnie A. Curtis, United States Marine Corps, this court-martial finds that the following aggravating factors have been proven beyond a reasonable doubt:
>
> That with regard to the premeditated murder of Mrs. Joan M. Lotz, the premeditated murder of her was committed while the accused, Lance Corporal Ronnie A. Curtis, U.S. Marine Corps, was engaged in the commission of a burglary;



> That with regard to the premeditated murder of Mrs. Joan M. Lotz, that the accused, Lance Corporal Ronnie A. Curtis, has been found guilty in the same case of another murder, to wit: That of Lieutenant James F. Lotz, United States Marine Corps Reserve, in violation of Article 118, Uniform Code of Military Justice; and
>
> That with regard to the premeditated murder of Lieutenant James F. Lotz, U.S. Marine Corps Reserve, the accused, Lance Corporal Ronnie A. Curtis, U.S. Marine Corps, has been found guilty in the same case of another murder, to wit: that of Mrs. Joan M. Lotz, in violation of Article 118, Uniform Code of Military Justice.

Either of these latter two "factors" meet the criteria of RCM 1004(c)(7)(J): "The accused has been found guilty in the *same case* of another violation of Article 118; . . . ." (Emphasis added.) There is some authority to the effect that the separate findings as to these two "factors" might represent a double counting of "aggravating factors"; and, hence, one of the findings might need to be vacated. *People v. Harris*, 36 Cal.3d 36, 201 Cal.Rptr. 782, 801, 679 P.2d 433, 452 (1984), *cert. denied*, 469 U.S. 965, 105 S.Ct. 365, 83 L.Ed.2d 301 (1984); *Wilson v. State*, 300 S.E.2d 640, 648, (Ga.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983); *State v. Goodman*, 257 S.E.2d 569 (NC 1979). We leave open this issue for consideration during further proceedings in this case. However, we observe that setting aside one "aggravating factor" where others remain does not mandate vacating the death sentence. *Clemons v. Mississippi, supra.* If it is decided hereafter that only two—rather than three—

"aggravating factors" should have been found by the court-martial, then it will be necessary for the Court of Military Review to determine whether the death sentence would have been adjudged at trial if only two "factors" had been found. *Cf. United States v. Sales*, 22 MJ 305 (CMA 1986); *United States v. Suzuki*, 20 MJ 248 (CMA 1985).

Article 66(c) UCMJ, 10 USC § 866(c), provides that, "[i]n a case referred to it, the Court of Military Review . . . may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, *as it finds correct in law and fact* and determines, *on the basis of the entire record*, should be approved." (Emphasis added.) This extensive appellate review, which includes review of appropriateness of sentence, seems unique to military justice. However, many states provide for review of death sentences—usually referred to as a "proportionality review." *See, e.g., Gregg v. Georgia, supra*, 428 U.S. 153, 96 S.Ct. 2909.

This review is not constitutionally required in civilian cases where the statutory procedures adequately direct the sentencing authority's exercise of discretion. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 306, 107 S.Ct. 1756, 1174, 95 L.Ed.2d 262, 288 (1987); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In view of the safeguards prescribed by RCM 1004, we are convinced that a "proportionality review" is not required by the Eighth Amendment, which prohibits "cruel and unusual punishments," or by Article 55, 10 USC § 855, which prohibits "cruel or unusual punishment." However, we conclude that such a review is encompassed within the responsibility for determining appropriateness of sentence under Article 66 of the Code. Likewise, in the unique context of the death penalty, we believe that Congress



intended for our Court to oversee this review in order to assure that it is properly performed.

In *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637, 650 (1983), the Supreme Court stated:

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

With this guidance in mind, we conclude that proportionality review *need not* be limited to death sentences from the accused's own Service or even to death sentences imposed by courts-martial.[23]

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[23] An interesting South Carolina case deals with a proportionality review of a death sentence where there had been no prior death sentences in that jurisdiction that could be used for comparison. *See State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799, 807 (1979):

> We have compared the death sentences imposed upon appellants with the sentences imposed in all prior capital cases tried under the current death penalty statutes and are satisfied that there are no similar cases against which the proportionality of the sentences imposed upon appellants can be measured.
>
> The inability of this Court to compare this case with any other similar cases does not require, however, that appellants' sentences be set aside. Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases. The first case must stand alone, otherwise comparative sentence review would be forever impossible.

(Footnote omitted.)

Accordingly, before a death sentence adjudged by a court-martial can be approved, the Court of Military Review must determine: (a) whether one or more valid aggravating factors have been unanimously found by the court-martial and this finding is factually and legally correct; (b) if any corrective action results in setting aside any such finding but leaves intact at least one "aggravating factor," whether this error affected imposition of the sentence; (c) whether the death sentence adjudged is proportionate to other death sentences that have been imposed; and (d) whether under all of the facts and circumstances of the case the death sentence is appropriate, Art. 66(c).

VI

We shall set this case for further argument to dispose of the remaining questions which have been raised by the defense. After deciding them, we shall issue our mandate.

SULLIVAN, Chief Judge (concurring):

I concur with the scholarly and excellent opinion of Senior Judge Everett concerning the constitutionality of RCM 1004, Manual for Courts-Martial, United States, 1984. However, I reserve judgment on the effect of Article 66, Uniform Code of Military Justice, 10 USC § 866, on this case since such a holding is not required to answer the specified issues decided today.

It is my personal view, however, that, in peacetime, a servicemember in a capital case should be tried by a 12-member court-martial. The value of a soldier's life is surely equal to the value of the life of his fellow citizens. *Cf. Williams v. Florida,* 399 U.S. 78, 103, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970). Nevertheless, neither the



Constitution itself, nor Congress in legislation, nor the President by regulation has mandated a 12-member panel in a military capital case. *See generally* Van Loan, *The Jury, the Court-Martial, and The Constitution,* 57 Cornell L. Rev. 363, 384 n. 118 (1972). Moreover, it is the duty of this Court to apply the law of the land, not to legislate by judicial fiat, and therefore, it is beyond our power to mandate such a procedure. Finally, appellant himself, by use of his challenges, reduced in part the number of court members detailed to this case from 15 to 9. Moreover, he did not particularly object to trial by 9 members at this court-martial or request the detail of additional members. I could not find reversible error in these circumstances even if appellant was somehow entitled to a 12-member panel.

COX, Judge (concurring):

I concur with the resolution of the specified issues before us. I write only to reserve judgment on some other matters discussed by Senior Judge Everett which are used to illustrate the rationale of his decision.

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This was the first capital punishment case reviewed in South Carolina under death penalty statutes revised after *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972).

**Manual for Courts-Martial, United States, 1984**
**Rule for Courts-Martial 1004**
**(Prior to 1991 Amendment)**

**Capital cases**

(a) *In general.* Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

★ (2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and

(3) The requirements of subsections (b) and (c) of this rule have been met.

(b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

★ (1) *Notice.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

★ (2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M.



1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.

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(3) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.

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★ (4) *Necessary findings.* Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.

(5) *Basis for findings.* The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

★ (6) *Instructions.* In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsection (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

★ (7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

★ (8) *Announcement.* If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

★ (c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118 or 120;

★ (2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

★ (3) That the offense caused substantial damage to the national security of the United States, whether or not the



accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

★ (4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, of piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

★ (F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid. 315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged,



substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing;

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

★ (11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, ''national security'' means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage

over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) *Spying.* If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) *Other penalties.* Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it.

★ Indicate changes established by executive order 12550.



**Uniform Code of Military Justice Article 18**
**10 U.S.C. § 818**
**Jurisdiction of general courts-martial**

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

## Uniform Code of Military Justice Article 36
## 10 U.S.C. § 836
## (Prior to 1990 Amendment)
## President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.



## Uniform Code of Military Justice Article 56
## 10 U.S.C. § 856
## Maximum limits

The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

## Uniform Code of Military Justice Article 106a
## 10 U.S.C. § 906a
## Espionage

(a)(1) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in paragraph (2), either directly or indirectly, any thing described in paragraph (3) shall be punished as a court-martial may direct, except that if the accused is found guilty of an offense that directly concerns (A) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (B) war plans, (C) communications intelligence or cryptographic information, or (D) any other major weapons system or major element of defense strategy, the accused shall be punished by death or such other punishment as a court-martial may direct.

(2) An entity referred to in paragraph (1) is—

(A) a foreign government;

(B) a faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States; or

(C) a representative, officer, agent, employee, subject, or citizen of such a government, faction, party, or force.

(3) A thing referred to in paragraph (1) is a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense.



(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—

(A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and

(B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out under subsection (c).

(2) Findings under this subsection may be based on—

(A) evidence introduced on the issue of guilt or innocence;

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.

(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

(4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).



## Uniform Code of Military Justice Article 118
## 10 U.S.C. § 918
## Murder

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

## Executive Order 12460

## Amendments to the Manual for Courts-Martial, United States, 1969 (Revised Edition)

January 24, 1984

By the authority vested in me as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code (the Uniform Code of Military Justice), in order to prescribe amendments to the manual for Courts-Martial, United States, 1969 (Revised edition), prescribed by Executive Order No. 11476, as amended by Executive Order No. 11835, Executive Order No. 12018, Executive Order No. 12198, Executive Order No. 12233, Executive Order No. 12306, Executive No. 12315, Executive Order No. 12340, and Executive Order 12383, it is hereby ordered as follows:

Section 1. Paragraph 75 of the said Manual for Courts-Martial is amended by adding, after paragraph 75f, the following:

''g. Capital cases.

''(1) In general. Death may be adjudged only when:

''( ) Death is expressly authorized under the code and this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

''(b) The requirements of 75g (2) and (3) have been met.

''(2) Procedure. In addition to the other provisions in 75, the following procedures shall apply in capital cases—

''(a) Notice. Before arraignment, trial counsel shall give the defense written notice of which aggravating circumstances under 75g(3) the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating circumstances under 75g(3) shall not bar later notice and proof of such additional aggravating circumstances unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.



''(b) Evidence of aggravating circumstances. Trial counsel may present evidence in accordance with 75b(4) tending to establish one or more of the aggravating circumstances in 75g(3).

''(c) Evidence in extenuation and mitigation. The accused shall be given broad latitude to present evidence in extenuation and mitigation.

''(d) Necessary findings. Death may not be adjudged unless the members find:

''(i) Beyond a reasonable doubt that one or more of the aggravating circumstances under 75g(3) existed; and

''(ii) That any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances including such circumstances under 75g(3) as the members have found existed.

''(e) Basis for findings. The findings in 75g(2)(d) may be based on evidence introduced before the findings on the issue of guilt, during the sentencing proceeding, or both.

''(f) Instructions. In addition to the instructions required under 76b(1), the military judge shall instruct the members on such aggravating circumstances under 75g(3) as may be in issue in the case and on the requirements and procedures under 75g (2)(d), (e), (g), and (h). The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

''(g) Voting. In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating circumstance under 75g(3) on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating circumstance.

After voting on all the circumstances on which they have been instructed, the members shall vote on a sentence in accordance with 75b(2) and (3).

''(h) Announcement. If death is adjudged, the president shall, in addition to complying with 76c, announce which aggravating circumstances under 75g(3) were found by the members.

''(3) Aggravating circumstances. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating circumstances:

''(a) That the offense was committed before or in the presence of the enemy, except that this circumstances shall not apply in the case of a violation of Article 118 or 120;

''(b) That in committing the offense the accused intended to:

''(i) cause substantial damage to the national security of the United States; or

''(ii) cause substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

''(c) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this circumstance shall not apply in the case of a violation of Article 118 or 120;

''(d) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this circumstance shall not apply to a violation of Article 120;

''(e) That the accused committed the offense with the intent to avoid hazardous duty;

''(f) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in



territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

''(g) That, only in the case of a violation of Article 118(1):

''(i) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

''(ii) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

''(iii) The murder was committed for the purpose of receiving money or a thing of value;

''(iv) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

''(v) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

''(vi) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice-President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress or Member-of-Congress elect, or any judge of the United States;

''(vii) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of

any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

''(viii) The murder was committed with intent to obstruct justice;

''(ix) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim; or

''(x) The accused has been found guilty in the same case of another violation of Article 118;

''For purposes of this paragraph, 'national security' means the national defense and foreign relations of the United States and specifically includes; (a) a military or defense advantage over any foreign nation or group of nations, (b) a favorable foreign relations position, or (c) a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert. Examples of substantial damage to the national security of the United States may include: impeding the performance of a combat mission or operation; impeding the performance of an important mission in a place subject to hostile fire or imminent danger pay (see 37 U.S.C. section 310(a)) and disclosing military plans, capabilities, or intelligence such as to jeopardize any combat mission or operation of the armed services of the United States or its allies or to materially aid an enemy of the United States.

''(h) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing;

''(i) That, only in the case of a violation of Article 120:

''(i) The victim was under the age of 12; or

''(ii) The accused maimed or attempted to kill the victim; or

''(j) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense.



''(4) Spying. If the accused has been found guilty of spying under Article 106, 75g(1)(b), (2), and (3), and 76 shall not apply. Sentencing proceedings in accordance with 75a through f shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.''

Sec. 2. Paragraph 76b(1) is amended by adding in the first sentence after the language ''in 76b(2) and 76b(3),'' the following language:

''and, in capital cases, 75g(2)(g),''

Sec. 3 Paragraph 76b(3) is amended by adding after the first sentence the following language:

''See 75g(2)(g).''

Sec. 4. Paragraph 126a is amended by adding after the third sentence in the second paragraph the following language:

See 75. ''.''

Sec. 5. Paragraph 126b is amended by adding after the language ''by the code'' the second time it appears, the following language;

''and this Manual''

Sec. 6. These amendments shall be effective immediately. These amendments shall apply in trials of capital offenses committed on or after this date.

Sec. 7. The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with Section 836 of Title 10 of the United States Code.

RONALD REAGAN
THE WHITE HOUSE,
January 24, 1984.

(7)

Supreme Court, U.S.
FILED
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No. 94-1966

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ARMED FORCES*

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## QUESTIONS PRESENTED

I. Whether, because Congress' legislative responsibility to establish aggravating factors in military capital cases involves individual liberties protected by the Fifth and Eighth Amendments, an explicit delegation of legislative power to the President is necessary.

II. If an explicit delegation of legislative authority is not required, whether an implicit delegation of Congress' legislative power to establish aggravating factors may be divined from various and sundry provisions of the Uniform Code of Military Justice.*

III. If there has been such an implicit delegation of authority to the President, whether Congress has established constitutionally adequate standards to guide the President's exercise of legislative authority.

IV. Whether it is consistent with the Framer's intent, the dictates of Articles I and II of the Constitution, and the Eighth Amendment to permit Congress to delegate to the President its responsibility to define aggravating factors which will define the class of servicemembers eligible for the death penalty.

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*The Questions Presented have been rephrased and reordered but the substance has not been changed. Sup. Ct. R. 24(a), ___ U.S. ___, 115 S.Ct. CCCXXXIII (1995). Questions I and II of the Brief were both incorporated in Question II of the Petition for Writ of Certiorari.

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U.C.M.J. article 102, 10 U.S.C. § 902 ..... 33

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U.S. Const. art. II, § 2 ..... 43, 51

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U.S. Const. art. III ..... *passim*

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ALI, Model Penal Code (Rev. Ed. 1980) ..... *passim*

Declaration of Rights, 1 Wm. & Mary, Sess. 2, ch. 2 (1689) ..... 44, 45

Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction,* 13 Vand. L. Rev. 435 (1960) ..... *passim*

Friendly, Benchmarks (1967) ..... 27

Granucci, *Nor Cruel and Unusual Punishments Inflicted' The Original Meaning,* 57 Calif. L. Rev. 839 (1969) ..... 44

H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess., *reprinted in* 1985 U.S.C.C.A.N. 571 ..... 24

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Mutiny Act of 1689, 1 Wm, & Mary, ch. 5 .... 42

NAACP Legal Defense Fund, Inc., *Death Row, U.S.A.* (Summer 1995) ..... 40

Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker,* 54 Minn. L. Rev. 1 (1969) ..... 38



Schoenbrod, Power Without Responsibility (Yale Univ. Press 1993) ..... 45

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The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison) ..... 8

*Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. (1949) ..... *passim*

*Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services,* 81st Cong., 1st Sess. (1949) ..... 48

Warren, *The Bill of Rights and the Military,* 37 N.Y.L.R. 181 (1962) ..... 12

Wells, The Life and Public Services of Samuel Adams ..... 42

Winthrop, Military Law and Precedents (2d ed. 1920) ..... 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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No. 94-1966

**DWIGHT J. LOVING,**
*Petitioner,*

*v.*

**UNITED STATES OF AMERICA,**
*Respondent.*

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ARMED FORCES*

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# BRIEF FOR THE PETITIONER

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 41 M.J. 213. Pet. App. 1a-227a.[1] The order denying rehearing is reported at 42 M.J. 109. Pet. App. 228a.

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[1] Pet. App. refers to the Appendix to the Petition for Writ of Certiorari.

## JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(1), the United States Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals) having reviewed this case pursuant to Uniform Code of Military Justice [hereinafter U.C.M.J.] article 67(a)(1), 10 U.S.C. § 867(a)(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. U.S. Const. art. I, § 1, which provides, in pertinent part, "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."

2. U.S. Const. art. I, § 8. cl. 14, which provides, in pertinent part, "The Congress shall have Power. . .To make Rules for the Government and Regulation of the land and naval Forces. . . ."

3. U.S. Const. art. II, § 1, cl. 1, which provides, in pertinent part, "The executive Power shall be vested in a President of the United States. . . ."

4. U.S. Const. art. II, § 2, cl. 1, which provides, in pertinent part, "The President shall be Commander in Chief of the Army and Navy of the United States. . . ."

5. The Fifth Amendment to the United States Constitution, which provides, in pertinent part, "No person shall be. . .deprived of life, liberty, or property, without due process of law."

6. The Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

7. U.C.M.J. article 18, U.S.C. § 818, which establishes the jurisdiction of general courts-martial. J.A. 139.[2]

[2] J.A. refers to the Joint Appendix.



8. U.C.M.J. article 36, 10 U.S.C. § 836(a), which allows the President to prescribe procedural rules for courts-martial. J.A. 140.

9. U.C.M.J. article 56, U.S.C. § 856, which allows the President to prescribe maximum punishments for non-capital offenses. J.A. 141.

10. U.C.M.J. article 118, 10 U.S.C. § 918, which provides that any person convicted of premeditated murder or felony murder "shall suffer death or imprisonment for life as a court-martial may direct." J.A. 145.

11. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 1004(c), which purports to establish the aggravating factors to be used in capital cases under the U.C.M.J. J.A. 132-38.

## STATEMENT OF THE CASE

Dwight Loving was serving as a Private (E1) in the United States Army at Fort Hood, Texas, at the time of his offenses and trial before a general court-martial. He was found guilty of attempted murder, premeditated murder, felony murder, and four specifications of robbery, in violation of U.C.M.J. articles 80, 118(1) and (4), and 122, 10 U.S.C. §§ 880, 918(1) and (4), and 922, respectively. On April 3, 1989, the court-martial panel announced three aggravating factors, pursuant to R.C.M. 1004(c)(7)(B) & (J) and R.C.M. 1004(c)(8), J.A. 135-37, and sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances.

The United States Army Court of Criminal Appeals (formerly the United States Army Court of Military Review), affirmed Mr. Loving's convictions and sentence without discussion of petitioner's challenge to the constitutionality of R.C.M. 1004. *United States v. Loving*, 34 M.J. 956, *recon. denied*, 34 M.J. 1065 (A.C.M.R. 1992); Pet.

App. at 230a. The Armed Forces Court of Appeals also affirmed Mr. Loving's convictions and sentence, but declined to discuss his challenge to R.C.M. 1004, citing its opinions in *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983), and *United States v. Curtis,* 32 M.J. 252 (C.M.A.) *cert. denied,* 502 U.S. 952 (1991). Pet. App. 141a-142a.

In *Matthews,* the Armed Forces Court of Appeals held that then-existing military capital sentencing procedures were unconstitutional because there was no requirement "that the court members make specific findings as to individualized aggravating circumstances." *Matthews,* 16 M.J. at 380. The court declared in dicta that the defects could be corrected either by Congress in the exercise of its Article I power, or by the President "in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers expressly delegated to him by Congress." *Id.*

Following *Matthews,* the President, without Congressional direction, amended the Manual for Courts-Martial, United States, 1969 (Rev. Ed.), to include capital sentencing procedures and specific aggravating factors. Executive Order 12460, 49 Fed. Reg. 3169 (1984); J.A. 146-51. The President subsequently promulgated the Manual for Courts-Martial, United States, 1984, which became effective on August 1, 1984, and included the aggravating factors to be applied in capital cases in R.C.M. 1004(c).[3] J.A. 134-38. The United States Court of Appeals for the Armed Forces, in *Curtis,* held that the establishment of aggravating factors by the President was constitutional.[4] J.A. 88-131.

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[3]R.C.M. 1004 was subsequently amended in February 1986, July 1991, and November 1994.

[4]*See also United States v. Curtis,* 28 M.J. 1074 (N.M.C.M.R. 1989); J.A. 1-87.



## SUMMARY OF ARGUMENT

Article I, § 8, cl. 14 of the United States Constitution grants to Congress the exclusive and plenary power to make all laws to be applied to servicemembers in the military justice system. Moreover, the Constitution, this nation's history and this Court's opinions evidence that the President, as Commander in Chief, has no inherent peacetime authority to encroach upon the strictly legislative task of establishing aggravating factors for military capital cases. Furthermore, the creation of aggravating factors, necessary elements in the legislative determination of whether the death penalty is an appropriate punishment in a particular case, potentially impinges upon a servicemembers rights guaranteed by the Fifth and Eighth Amendments. It is for this reason that only an explicit delegation of legislative power by the Congress would justify the President's exercise of legislative power. Because Congress has not explicitly delegated its power in this area, the President's creation of aggravating factors violates the separation of powers doctrine.

Congress has not implicitly delegated its authority to the President. In order to find an implicit delegation, the lower court ignored the fact that the military was granted jurisdiction to try servicemembers for the capital offense of murder in peacetime within the geographical limits of the United States for the first time in 1950. The lower court also disregarded Congress' overriding concern, when enacting the U.C.M.J., that the power of military commanders in the military justice system be limited. Finally, the lower court completely disregarded this Court's rules of statutory construction, which disfavor any inference of Congressional intent delegating authority to the President to determine which servicemembers shall be eligible for the death penalty.

Congress has not set forth an intelligible principle guiding and limiting the President's exercise of legislative power. Article 36 of the U.C.M.J. refers only to principles of law applied in the United States district courts and there were no such capital aggravating factors at the time of the President's promulgation of R.C.M. 1004(c), with the sole exception of factors applicable only to aircraft piracy. Moreover, Article 36 excuses the President from following even this guidance by allowing compliance only in so far as the President "considers practicable." The lack of an intelligible principle guiding the President's discretion renders any purported implicit delegation of authority unconstitutional.

Finally, any Congressional delegation of authority to establish aggravating factors in capital cases is unconstitutional. The intent of the Framers in Article I, § 8, cl. 14 and the Eighth Amendment was for Congress to make all policy judgments concerning what acts would be punished as criminal offenses and what the punishment should be for those offenses. The determination of what offenders will be eligible for the death penalty is a fundamental policy judgment which must be made by Congress as the elected representatives of American society. While Congress may delegate some technical or complex decisions, the determination of aggravating factors is not a decision which falls into this category. Indeed, with the exception of R.C.M. 1004(c), no aggravating factors have been established outside the halls of the legislatures—state and federal—in the modern era of capital punishment. Even assuming that Congress may delegate its authority, it may not make that delegation to the President because such a delegation places in the President, as Commander in Chief, legislative, executive, and judicial powers. This blending of functions is precisely what the Framers endeavored to avoid.



## ARGUMENT

### I. ONLY EXPLICIT CONGRESSIONAL ACTION IS SUFFICIENT TO DELEGATE AUTHORITY TO THE PRESIDENT TO ESTABLISH RULES OF LAW WHICH INFRINGE UPON INDIVIDUAL LIBERTIES PROTECTED BY THE FIFTH AND EIGHTH AMENDMENTS.

In finding that the President has authority to establish aggravating factors in capital cases, the military court in *Curtis* relied upon the President's inherent authority; U.C.M.J. articles 18, 36, 56, and 106a, 10 U.S.C. §§ 818, 836, 856, and 906a, respectively; and, Congressional silence after R.C.M. 1004 was promulgated. J.A. 105-22. Based on these factors, the lower court concluded "that Congress has—at least, implicitly—delegated this task to the President." J.A. 112 n.9. The military court's analysis was flawed, however, because the power to establish rules and regulations for the government of the armed forces resides wholly in Congress and, thus, any Congressional delegation of authority to establish aggravating factors in capital cases must be explicit.

#### *A. The power to establish rules and regulations for the government of the armed forces during peacetime resides wholly in Congress.*

Contrary to the government's assertion in the Brief in Opposition to the Petition for a Writ of Certiorari, BIO at 14, the President has no inherent authority to act in the military justice system and thus the "less stringent" standard of *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975), is inapplicable in this case. The power to create rules and regulations for the government of the armed forces resides wholly in Congress. This conclusion is

inescapable when viewed in light of this nation's history, the plain language of the Constitution, and this Court's opinions.

In the Declaration of Independence, the founders of this country listed a number of grievances against King George III, including his interference with the law-making authority of legislatures and his protection of the armies from criminal punishments for offenses committed against citizens. After listing the transgressions of the executive, the founding fathers declared that the King's was "a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these States." Thus, it is obvious from this document alone that this country was founded based upon fear of an executive who creates law, executes it, and acts as judge, jury, and sentencing authority. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 641 (1952) (Jackson, J., concurring); *Reid v. Covert,* 354 U.S. 1, 68 (1957) (Harlan, J., concurring).

To remedy this situation, and to prevent executive or other tyranny from again controlling the United States of America, the Framers of the Constitution created a government which separated the powers of the sovereign into three separate branches.

> Basic to the constitutional structure established by the Framers was their recognition that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison).

*Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 57 (1982). With respect to the military, the



primary concern of the Framers of the Constitution was to preclude the executive branch from later laying claim to various powers reserved to Congress. Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction,* 13 Vand. L. Rev. 435, 457 (1960).

In separating the powers to prevent tyranny, the Framers of the Constitution made the President Commander in Chief of the military but gave to Congress the power to legislate, to declare war, to raise and support armed forces, to make rules for the government and regulation of the armed forces, and to call forth and govern the militia. U.S. Const. art. I. §§ 1 & 8. Thus, even in the military, the "rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch." *Mistretta v. United States,* 488 U.S. 361, 386 n.14 (1989).

As this Court recognized in *Youngstown Sheet & Tube Co.,* 343 U.S. at 587, contrary to the government's assertion that the President had inherent authority as Commander in Chief to seize the nation's steel mills:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

*See also Ex Parte Milligan,* 71 U.S. 2, 121 (1866) (the President, as Commander in Chief, "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is no unwritten criminal code to which resort can be had as a source of

jurisdiction''). Likewise, this Court specifically recognized long ago that:

> If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

*Reid,* 354 U.S. at 38-39. Thus, it is clear that whatever inherent power the President has as Commander in Chief, the Framers of the Constitution never intended and this Court, interpreting the Constitution under its Article III powers, has never construed the President's powers to be broad enough to establish policy or rules for the government and regulation of courts-martial.[5] Because aggravating factors are, in military capital cases, necessary elements in the determination of whether death is an appropriate punishment, their creation is a policy determination which is reserved to Congress.[6] *Sawyer v. Whitley,* 505 U.S. 333, ___, 112 S.Ct. 2514, 2522 (1992); *see also Romano v. Oklahoma,* ___ U.S. ___, 114 S.Ct. 2004, 2009 (1994) (quoting *California v. Ramos,* 463 U.S. 992, 999, 1008 (1983)) (statutory aggravating circumstances are ''substantive factors'' which create the ''legislatively defined category of persons eligible for the

[5]Although the President has no inherent power in this arena, Congress has explicitly delegated authority to the President to set the maximum punishments for non-capital offenses and to establish procedures for courts-martial, U.C.M.J. articles 18, 36, & 56.

[6]Even the Drafter's Analysis of R.C.M. 1004 indicates that after conviction, the finding of at least one specific aggravating factor beyond a reasonable doubt is a ''second 'threshold' which must be passed before death may be adjudged.'' Manual for Courts-Martial, United States, 1984, Appendix 21 at 70.



death penalty''); *Bullington v. Missouri,* 451 U.S. 430, 433 (1981).

### *B. This Court must construe narrowly any purported delegation of legislative power to establish aggravating factors in capital cases.*

In determining whether Congress has delegated its authority to the President to establish aggravating factors in military capital cases, this Court must ''construe narrowly'' any purported delegation. *Kent v. Dulles,* 357 U.S. 116, 129 (1958); *see also Greene v. McElroy,* 360 U.S. 474, 506 (1959). In *Kent,* this Court held, despite the President's inherent authority in foreign affairs and his statutory authority to prescribe rules for the issuance of passports, that the Executive did not have authority to promulgate regulations denying passports to Communists or to demand a non-Communist affidavit from any citizen applying for a passport. In reaching this result, the Court declared that it would not ''readily infer'' that Congress intended to delegate ''unbridled discretion'' to impinge on constitutional rights protected by the Fifth Amendment. *Kent,* 357 U.S. at 129. Specifically, this Court declared that when an individual's constitutional rights are impacted upon, ''it must be pursuant to the lawmaking functions of the Congress. And if that power is delegated, . . .we will construe narrowly all delegated powers that curtail or dilute'' individual rights. *Id.* at 129.

Likewise, in *Greene v. McElroy,* this Court once again recognized that where an interest included within the ''liberty'' concept of the Fifth Amendment was at stake, 360 U.S. at 492, the propriety of governmental action ''should be decided on the narrow[] ground of 'authorization,''' *id.* at 493. The Court held that ''acquiescence or implied ratification'' is not ''enough to show delegation of authority to take actions within the area of questionable

constitutionality.'' *Id.* at 506; *see also Mistretta,* 488 U.S. at 373 n.7 (Court will apply ''narrow construction[] to statutory delegations that might otherwise be thought to be unconstitutional''); *Industrial Union Dep't v. American Petroleum Inst.,* 448 U.S. 607, 645 (1980) (''In the absence of a clear mandate. . .it is unreasonable to assume that Congress intended to give. . .unprecedented power''); *c.f. Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976) (Rehnquist, J., dissenting).

As argued in full, *infra* at 37-50, the Eighth Amendment and the separation of powers doctrine leave no doubt that the establishment of aggravating factors by the President is in an ''area[] of doubtful constitutionality.'' *Greene,* 360 U.S. at 507. Moreover, Mr. Loving's interest in not being executed unlawfully is certainly an interest included in the ''life, liberty, or property'' protected by the Due Process clause of the Fifth Amendment and an interest protected by the Eighth Amendment.[7] *See Gregg v. Georgia,* 428 U.S. 153, 177 (1976) (Fifth and Eighth Amendments impose ''certain limits on the prosecution of capital cases''). Thus, only ''explicit action by lawmakers,'' *Greene,* 360 U.S. at 507, would suffice to render R.C.M. 1004(c) a constitutionally proper exercise of Executive authority. *Cf. Sweezy v. New Hampshire,* 354 U.S. 234, 255 (1957) (legislature must ''direct the use'' of delegated powers which ''causes a deprivation of the constitutional rights of individuals'').

[7]Mr. Loving's status as a member of the armed services does not deprive him of the protections of the due process clause of the Fifth Amendment, *Middendorf v. Henry,* 425 U.S. 25, 43 (1976), or the Eighth Amendment, *Trop v. Dulles,* 356 U.S. 86 (1958). *See also* Earl Warren, *The Bill of Rights and the Military,* 37 N.Y.L.R. 181 (1962). In addition, U.C.M.J. article 55, 10 U.S.C. § 855, provides protection against ''cruel *or* unusual'' punishment and, thus, provides even greater protection than the Eighth Amendment.



## II. IN LIGHT OF THE HISTORY OF MILITARY JURISDICTION TO TRY SERVICEMEMBERS FOR NON-MILITARY CAPITAL OFFENSES AND THIS COURT'S RULES OF CONSTRUCTION, NO IMPLICIT DELEGATION OR RATIFICATION OF AUTHORITY MAY BE FOUND WHICH AUTHORIZES THE PRESIDENT TO DETERMINE WHICH SERVICEMEMBERS SHALL BE ELIGIBLE FOR THE DEATH PENALTY.

In asserting that the President was within his authority to establish aggravating factors, the lower court relied, in part, on U.C.M.J. articles 18, 36, 56, and 106a. In addition to ignoring the need for an explicit delegation of authority, in construing these statutes broadly and finding an implicit delegation or ratification of authority, the lower court ignored almost two hundred years of history in which Congress completely withheld from the military the authority to try servicemembers for non-military capital offenses committed during peacetime within the geographical limits of the United States. In addition, the lower court completely disregarded this Court's rules of statutory construction.

### *A. This nation's entire history prior to enactment of the U.C.M.J. reflects that Congress intended that servicemembers would not be subjected to the death penalty by military courts for non-military capital offenses committed during peacetime.*[8]

The American Articles of War, passed in 1776, allowed court-martial jurisdiction over servicemembers for non-military offenses only for ''[a]ll crimes not capital. . . .though not mentioned in the above articles of

[8]For a more detailed history, *see* the Joint *Amicus Curiae* Brief of the Navy-Marine Corps and the Air Force.

war." American Articles of War, 1776, Section XVIII, Article 5, reprinted in W. Winthrop, Military Law and Precedents 971 (2d ed. 1920).[9] Construing the phrase "not capital," as found in the similar provision of the 1874 Articles, American Articles of War, 1874, Section XXVII, Article 62, reprinted in Winthrop at 721, Colonel Winthrop (the "Blackstone of Military Law")[10] declared:

> The Article, by these words, expressly excluded from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in time of peace,) all capital crimes of officers or soldiers under whatever circumstances committed—whether upon or against military persons or civilians. By *capital* crimes is to be understood crimes punished or made *punishable* with death by the common law, or by a statute of the United States applicable to the case—as, for example, murder, arson, or rape.

Winthrop at 721 (footnotes omitted) (emphasis in original); *see also Grafton v. United States,* 206 U.S. 333, 348 (1907) (under the 1776 Articles of War, no crimes of servicemembers are excepted from military jurisdiction "except those that are capital in their nature").

The first time that Congress permitted the military to try a servicemember for the civilian capital offense of murder was during the Civil War. *Lee v. Madigan,* 358 U.S. 228, 233 (1959) (citing 12 Stat. 736 (1863)). The relevant statute limited the military's jurisdiction over the offense, however, to "time of war, insurrection, or rebellion." *Coleman v. Tennessee,* 97 U.S. 509, 513 (1878).[11] Indeed,

[9]This article remained substantially unchanged throughout the nation's history and is now found in U.C.M.J. article 134, 10 U.S.C. § 934. *Parker v. Levy,* 417 U.S. 733, 746 n.36 (1974).

[10]*Reid v. Covert,* 354 U.S. at 19 n.38.

[11]The petitioner in *Coleman* had been sentenced to die by a general court-martial.



this Court held that the statute had no application when "the civil courts were open and in the undisturbed exercise of their jurisdiction." *Caldwell v. Parker,* 252 U.S. 376, 386 (1920) (quoting *Coleman,* 97 U.S. at 515).

Subsequently, in 1916, Congress provided that murder and rape were punishable by death in a court-martial, but also provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." American Articles of War, 1916, Article 92; *see also Kahn v. Anderson,* 255 U.S. 1, 9-10 (1921). It was not until 1950, in the U.C.M.J., that Congress extended to military courts the jurisdiction to try servicemembers for nonmilitary capital offenses committed within the geographical limits of the United States in peacetime. U.C.M.J. articles 118, 120(a); 10 U.S.C. §§ 918, 920(a).

Although the military was finally granted jurisdiction of non-military capital offenses in peacetime, the evolution of the U.C.M.J. clearly establishes that Congress intended that death would be an authorized punishment only when Congress and Congress alone decided that the servicemember should be eligible for the death penalty.[12] In addition, one of Congress' overriding concerns in 1950 was providing more safeguards for servicemembers by minimizing opportunities for command influence,[13] which is reflected in a number of articles, including Article 37, 10 U.S.C. § 837 (unlawful command influence of the action of a

[12]*See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. (1949), *reprinted in* Index and Legislative History of the Uniform Code of Military Justice, at 960-61, 1088 (1950) (Statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense).

[13]Command influence is a term of art in the military, but generally implies a commander's improper influence based on rank and position of authority (either intentionally or unintentionally) on the decisions of court-martial members.

court is prohibited) and Article 67, 10 U.S.C. § 867 (creation of an appellate court composed of civilian judges).[14]

The historical limits on the military court's ability to impose the death penalty make it completely unreasonable to assume that after nearly two hundred years of keeping tight reign on the authority of the military to try servicemembers for non-military capital offenses during peacetime, Congress would utterly abandon all control over the fate of servicemembers by giving the President unfettered discretion to determine which servicemembers would be eligible for these newly recognized capital offenses. *See Lee,* 358 U.S. at 235 (1959) ("We will attribute to Congress a purpose to guard jealously against the dilution of the liberties" of servicemen).

***B. When this Court's rules of statutory construction are properly applied, it is clear that Congress did not delegate authority to the President to establish aggravating factors.***

In finding an implicit delegation or ratification of authority, the lower court violated at least five basic rules of statutory construction. First, "[a]bsent a clearly expressed legislative intention to the contrary," the language of the statute itself is "regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980); *see also Hubbard v. United States,* ___ U.S. ___, 115 S.Ct. 1754, 1759 (1995); *West Virginia University Hosps., Inc. v. Casey,* 499 U.S. 83, 98-99 (1991). Second, when a statute is ambiguous even after review of the plain language and the legislative history, the Court will construe the statute in a manner which avoids serious doubt of constitutionality. *Concrete Pipe & Prod. of California, Inc. v. Construction Laborers Pension Trust*

[14] Judge Wiss, in his dissent below, also found "the cancerous possibility that command influence" was involved in this case. Pet. App. 178a.



*for S. California,* ___ U.S. ___, 113 S.Ct. 2264, 2283 (1993). Third, "acquiescence or implied ratification" is not "enough to show delegation of authority to take actions within the area of questionable constitutionality." *Greene v. McElroy,* 360 U.S. at 506-07. Fourth, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313 (1960); *see also United States v. X-Citement Video, Inc.,* ___ U.S. ___, 115 S.Ct. 464, 471 and n.6 (1994). Finally, criminal statutes are to be construed narrowly, *United States v. Mersky,* 361 U.S. 431, 440 (1960), and "any uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity," *United States v. Kozminski,* 487 U.S. 931, 952 (1988); *see also United States v. Thompson/Center Arms Co.,* 504 U.S. 505 (1992).

*1. The plain language and legislative history of U.C.M.J. articles 18, 36, and 56 reveal that Congress did not intend to delegate authority to the President to determine under what circumstances a servicemember should be eligible for the death penalty.*

Article 18 authorizes a general court-martial to exercise jurisdiction over any offense "under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death *when specifically authorized by this chapter.*" J.A. 139 (Emphasis added). Article 56 authorizes the President to prescribe limits on punishments. J.A. 141. The punitive provisions of the U.C.M.J. reflect that Congress authorized death as a punishment for a number of offenses, but otherwise directed that an offender "shall be punished as a court-martial may direct" within the limits prescribed by

the President.[15] Clearly, Congress did not intend to give the President any authority with regard to the death penalty. It gave him authority in Articles 18 and 56 *only* to set *limits* on punishment which the court-martial panel may not exceed. Logically, no "limit" may be set on a penalty of death. Thus, these provisions are irrelevant to this case.[16]

Article 36 delegates to the President authority to establish rules for "[p]retrial, trial, and post-trial procedures, including modes of proof." J.A. 140. Clearly, under the plain language of the statute, Congress intended only that the President establish *procedural* rules for court-martial; not that he make policy or moral judgments about criminal offenses, criminal defenses, or other legislative judgments related to court-martial proceedings. Indeed, the Armed Forces Court of Appeals has repeatedly recognized this principle. *See Ellis v. Jacob,* 26 M.J. 90, 92-93 (C.M.A. 1988); *United States v. Frederick,* 3 M.J. 230, 236 (C.M.A. 1977); *United States v. Ware,* 1 M.J. 282, 285 (C.M.A. 1976); *see also Parker v. Levy,* 417 U.S. at 784 n.36 (Stewart, Douglas, and Brennan, JJ., dissenting).

In *Curtis,* the military court conceded that if aggravating factors are part of the required legislative determinations, then the President exceeded his authority. However, the court summarily dismissed this issue by finding that aggravating factors are not elements of a crime. J.A. 105. The appropriate question is not whether aggravating factors are elements of a crime, but rather whether aggravating

[15]The punitive articles of the U.C.M.J. include all articles between and including Article 77, 10 U.S.C. § 877, and 134, 10 U.S.C. § 934.

[16]Likewise, the lower court's finding that the President has for many years increased "maximum punishment because of aggravating circumstances" in non-capital cases, J.A. 108, is irrelevant. Pursuant to U.C.M.J. articles 18 and 56, in all the U.C.M.J. punitive articles in which Congress did not authorize death as a punishment, Congress has allowed the President to establish the maximum punishment. Thus, the President has only created aggravating factors to increase a punishment which he established in the first place.



factors are matters reserved for legislative policy decisions and moral judgments.

The determination of who shall be eligible for a sentence of death is the quintessential moral policy judgment which must be made by the legislature alone. The death penalty is the ultimate criminal sanction known to the law.

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. . . . And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

*Furman v. Georgia,* 408 U.S. 238, 306 (1972) (Stewart, J., concurring); *see also Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.). "Capital punishment is an expression of society's moral outrage at particularly offensive conduct." *Gregg,* 428 U.S. at 183 (Opinion of Stewart, Powell, and Stevens, JJ.); *see also Zant v. Stephens,* 462 U.S. 862, 877 n.15 (1983); *McCleskey v. Kemp,* 481 U.S. 279, 319 (1987). Thus, the death penalty is "ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live." *Spaziano v. Florida,* 468 U.S. 447, 469 (1984) (Stevens, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part).

Moreover, because the legislature is the voice constituted to speak for the people in all instances, including expressing moral outrange, this Court has long held that it is legislatures which must determine whether the death penalty is to be applied to American citizens. For instance, in *Gregg,* 428 U.S. at 175-76 (Opinion of Stewart, Powell, and Stevens, JJ.) (quoting *Furman,* 408 U.S. at 383 (Burger, C.J., dissenting)), this Court emphasized, "[I]n a democratic society legislatures. . .are constituted to respond

to the will and consequently the moral values of the people." Likewise, Justice Powell declared in his dissent in *Furman*, 408 U.S. at 418, that the decision to use capital punishment is uniquely "an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitable conduct." *See also Harris v. Alabama*, ___ U.S. ___, 115 S.Ct. 1031, 1035 (1995); *Penry v. Lynaugh*, 492 U.S. 302, 331, (1989); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988). Therefore, the determination of aggravating factors to "genuinely narrow the class of persons eligible for the death penalty," *Zant*, 462 U.S. at 877, in the Armed Forces, is uniquely the function of Congress. *See Gregg*, 428 U.S. at 176 (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)) (the specification of punishments is "peculiarly [a] question[] of legislative policy"); *see also Whalen v. United States*, 445 U.S. 684, 689 (1980).

Given the need for policy decisions and moral judgments involved in determining who shall be eligible for a death sentence, the delegation in U.C.M.J. article 36 to establish "procedures" is clearly not an explicit delegation supporting the President's creation of aggravating factors in capital cases. *See Greene*, 360 U.S. at 507 (only "explicit action by lawmakers" is sufficient to delegate authority to infringe on Fifth Amendment rights to "life, liberty, and property"). Likewise, nothing in the legislative history establishes that Congress intended in Article 36 to grant the President broad policy making authority.

Moreover, in determining the implications of these provisions on the capital punishment process, it is necessary to consider the timing of Congress' actions in enacting these provisions. All of these articles were part of the Uniform Code of Military Justice as passed in 1950—22 years before this Court's decision in *Furman*—and they



have not been substantially amended since that time.[17] Congress did not intend (and could not have intended), in 1950, to grant the President the authority to establish aggravating factors in military capital cases satisfying Eighth Amendment principles which did not emerge for more than twenty years. Articles 18, 36, and 56 and their legislative history, therefore, provide no support for the lower court's decision.

> *2. Even if the meaning of U.C.M.J. article 36 is ambiguous, the Court must construe the statute in a manner which avoids serious doubt of its constitutionality.*

This Court has long adhered to a "prudential concern that constitutional issues not be needlessly confronted." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.; see, e.g., National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974). This principle preserves "[t]he elementary rule [] that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895). Moreover, this rule recognizes that "courts will. . .not lightly assume that Congress" intended to infringe upon the Constitution. *Id.* Thus, whenever the unambiguous meaning of a statute

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[17] There were minor amendments to Article 18 in 1968. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1343. Article 36 underwent minor changes in 1979 and 1990. DOD Authorization Act of 1980, Pub. L. No. 96-107, 93 Stat. 804; National Defense Authorization Act of 1991, Pub. L. No. 101-510, 104 Stat. 1485.

cannot be gleaned from the plain and ordinary language of the statute or even its legislative history, this Court must construe the statute "to attain coherence by obviating constitutional problems." *Concrete Pipe,* 113 S.Ct. at 2283.

Interpreting the statute broadly to include authority to establish the necessary components in the determination of an accused's death-eligibility clearly raises a serious constitutional problem. *Reid v. Covert,* 354 U.S. at 38 ("If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials"). Thus, if there is any ambiguity, this Court must interpret the statute to conclude that Congress did not intend to delegate authority to the President to make moral policy judgments reserved to the legislature.

*3. Congressional acquiescence or implied ratification is insufficient to establish a delegation of authority to take actions within the area of questionable constitutionality.*

The lower court presumed that Congress was aware of the President's promulgation of R.C.M. 1004, J.A. 121,[18] and inferred that Congressional silence indicated Congress' implicit ratification of the President's actions, J.A. 121-22. In doing so, the lower court cited this Court's opinion in *Power Reactor Development Co. v. International Union of Electrical Workers,* 367 U.S. 396 (1961), for the proposition that "failure of Congress to complain about the content of regulations can be construed to be ratification." J.A. 112. The lower court's reliance on *Power Reactor* is

[18]The lower court noted that U.C.M.J. article 36(b) required, prior to the 1990 amendment, that all rules and regulations prescribed by the President for courts-martial be reported to Congress. J.A. 140.



misplaced. In that case, just as in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), and *Haig v. Agee,* 453 U.S. 280 (1981), Congress had granted *prior explicit* authority to act in specific circumstances to reach a specified "end." This Court only found *implicit* authority for and ratification of the agency's established "means" to reach the end. In petitioner's case, in contrast, Congress has never provided *prior explicit* authority for the President to establish constitutionally required aggravating factors. Furthermore, since *Power Reactor,* this Court has explicitly stated on numerous occasions that, "[a]s a general matter, we are 'reluctant to draw inferences from Congress' failure to act.'" *See, e.g., Brecht v. Abrahamson,* ___ U.S. ___, 113 S.Ct. 1710, 1719 (1993) (quoting *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 306 (1988)).

Moreover, as noted previously, this Court held in *Kent v. Dulles,* 357 U.S. at 129, and *Greene v. McElroy,* 360 U.S. at 507, that Congressional delegations granting authority to infringe upon an individual's Fifth Amendment rights to "life, liberty, and property" must be construed narrowly and must be explicit. "[A]cquiescence or implied ratification" is not "enough to show delegation of authority to take actions within the area of questionable constitutionality." *Greene,* 360 U.S. at 506-07; *Patterson v. McLean Credit Union,* 491 U.S. 164, 175 n.1 (1989) ("Congressional inaction cannot amend a duly enacted statute"); *Johnson v. Transportation Agency,* 480 U.S. 616, 671 (1987) (Scalia, J., joined by Rehnquist, C.J., dissenting) ("one must ignore rudimentary principles of political science to draw any conclusions regarding [Congressional] intent from the failure to enact legislation"); *see also Cleveland v. United States,* 329 U.S. 14, 22 (1946).

*4. The views of a subsequent Congress are insufficient to establish the intent of an earlier Congress.*

In finding an implicit ratification or delegation of authority, the lower court held that Congress' enactment of U.C.M.J. article 106a, 10 U.S.C. § 906a, J.A. 121-22, and a House Conference Report amounted to a ratification of the aggravating factors promulgated by the President in R.C.M. 1004(c). J.A. 112. In the 1985 enactment of Article 106a—made nearly two years after the President set forth the aggravating factors listed in R.C.M. 1004(c) and more than thirty years after the passage of U.C.M.J. articles 18, 36, and 56—Congress established three specific aggravating factors, but also added "[a]ny other factor that may be prescribed by the President by regulations under section 836 of this title (article 36)." Article 106a(c)(4); J.A. 144. The House Conference Report, stated in part:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provision of Rule for Courts-Martial 1004 of the Manual for Courts-Martial 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punishment articles.

H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 8, *reprinted in* 1985 U.S.C.C.A.N. 571, 579.

As this Court specifically recognized in *United States v. X-Citement Video, Inc.*, 115 S.Ct. at 471 n.6, "the views of one Congress as to the meaning of an act passed by an



earlier Congress are not ordinarily of great weight, and the views of the committee of one House of another Congress are of even less weight." (Citations omitted). Likewise, as the Court noted in *GTE Sylvania*, 447 U.S. at 118 n.13, a statement in a conference committee report related to subsequent legislation "does not bear strong indicia of reliability. . . . Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." Thus, even if the lower court was correct in finding that the 1985 Congress believed the President had authority under U.C.M.J. article 36 to establish aggravating factors in capital cases, this Congressional interpretation is irrelevant and sheds no light on the wording of U.C.M.J. article 36 or Congressional intent in 1950.

Furthermore, contrary to the military court's conclusion, the express delegation of authority in Article 106a can easily be interpreted to express Congressional belief that, absent an express delegation, the President is without authority to promulgate aggravating factors. *Cf. Kent v. Dulles*, 357 U.S. at 130. Moreover, the statement that the "conferees do not intend that. . .[the amendments to] Article 106a be construed as affecting the validity of the regulatory capital sentencing standards. . .for the other capital punishment articles," clearly indicates that there was no intent for Article 106a to be read as validating or invalidating R.C.M. 1004(c). Thus, if R.C.M. 1004(c) was invalid prior to the amendments to Article 106a, it remains invalid.

Even assuming that the express delegation in Article 106a to establish aggravating factors for espionage offenses in conjunction with the Conference Report represent an ex post approval of the President's decision establishing aggravating factors for other capital offenses, it is still inadequate. Legislative authority with respect to all other

capital cases may be delegated—just like any other act of Congress—only in accordance with the procedures established in Article I of the Constitution, i.e., "bicameral passage followed by presentment to the President." *INS v. Chadha,* 462 U.S. 919, 954-55 (1983).

*5. Criminal statutes must be construed narrowly and, under the rule of lenity, any ambiguity must be resolved in favor of the individual.*

This Court has long held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States,* 401 U.S. 808, 812 (1971); *see also Liparota v. United States,* 471 U.S. 419, 427 (1985); *Wiltberger v. United States,* 18 U.S. (5 Wheat) 76, 95 (1820). "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity" in favor of the individual, *United States v. Granderson,* ___ U.S. ___, 114 S.Ct. 1259, 1267 (1994). Thus, even assuming there is some ambiguity in U.C.M.J. articles 18, 36, and 56, the rule of lenity requires that the statutes be construed in favor of the individual and in favor of requiring Congress, in the exercise of its legislative powers, to establish the aggravating factors in capital cases. *Cf. Smith v. Goguen,* 415 U.S. 566, 575 (1974); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 168-70 (1972).

The rule of lenity is rooted in "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. Bass,* 404 U.S. 336, 348 (1971) (quoting H. Friendly, Benchmarks 209 (1967)). Surely, the distaste for an individual being sentenced to die without a clear Congressional statement that the President has authority to establish aggravating



factors is just as strong. The rule of lenity requires a finding that Congress made no such delegation.

## III. ANY IMPLICIT DELEGATION OF AUTHORITY TO THE PRESIDENT TO ESTABLISH AGGRAVATING FACTORS IS INVALID BECAUSE CONGRESS HAS NOT SET FORTH SUFFICIENT STANDARDS TO GUIDE THE PRESIDENT.

A delegation of legislative authority to the President, or to any other agency, is valid only "[s]o long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Mistretta,* 488 U.S. at 372 (quoting *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928)); *see also American Power & Light, Co. v. SEC,* 329 U.S. 90, 142 (1946). In other words, Congress must outline "the field within which [the delegate] is to act so that it may be known whether he has kept within it in compliance with the legislative will." *Yakus v. United States,* 321 U.S. 414, 425 (1944).

As noted previously, the lower court found only an implicit delegation or ex post ratification of authority. Therefore, *a fortiori* the lower Court could not (and did not) find an intelligible principle set forth in a statute which explicitly delegated authority to the President. Attempting (unsuccessfully) to solve this problem, the lower court looked to the language of U.C.M.J. article 36, which "directs that the President 'shall, *so far as he considers practicable,* apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with' the Uniform Code." J.A. 113 (emphasis added).

In the first instance, it is unprecedented for a court to look outside the delegatory legislation for an "intelligible

principle'' guiding the delegated power. In all other delegation cases decided by this Court, the legislation delegating congressional power also established the principles and policies to be utilized in exercising the delegated powers. *See, e.g., Touby v. United States,* 500 U.S. 160, 163-167 (1991); *Skinner v. Mid-America Pipeline Co.,* 490 U.S. 212, 224 (1989); *Mistretta,* 488 U.S. at 374-76. Thus, *ab initio,* if U.C.M.J. article 36 sets forth Congress' guidance to the President, it must be article 36 which delegates authority to the President. Moreover, even assuming arguendo that U.C.M.J. article 36 is the appropriate statute to consider in determining whether Congress has set forth an intelligible principle, this statute does not provide sufficient guidelines for the President or establish Congressional policy with respect to the aggravating factors required to narrow the class of servicemembers eligible for the death penalty.

### *A. The margin of indefiniteness of Congressional guidance in delegations of authority is narrowed in capital cases.*

This Court has on many occasions approved broad delegations of Congressional authority based on the practical recognition that ''in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot [in some instances] do its job absent an ability to delegate power.''[19] *Mistretta,* 488 U.S. at 372. Indeed, this Court has always followed a ''common sense'' approach which considers all of the circumstances surrounding the need for and limits of the delegation. *J.W. Hampton, Jr. & Co.,* 276 U.S. at 406.

In applying this flexible ''intelligible principle'' standard, this Court has repeatedly recognized that in delega-

[19]Creating aggravating circumstances to determine who is eligible for a death sentence, however, is not one of those instances where Congress is unable to perform its task without delegating authority. *See infra* at 39-40.



tions of *administrative* authority, Congress need not ''supply administrative officials with a specific formula for their guidance.'' *Lichter v. United States,* 334 U.S. 742, 785 (1948). On the other hand, w'en criminal sanctions or individual liberties are involved, the flexibility and the ''area of permissible indefiniteness [in Congressional delegations of authority] narrows.'' *United States v. Robel,* 389 U.S. 258, 275 (1967) (Brennan, J., concurring) (citations omitted); *Greene v. McElroy, supra; Kent v. Dulles, supra; see also United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921). Thus, while broad delegations of authority may be appropriate in some instances, this Court has, at least implicitly,[20] demanded that Congress provide far more specificity of purposes, goals, and factors to be considered when delegating authority which touches upon criminal offenses and penalties or individual liberties.

For example, in *Mistretta,* this Court found that adequate standards had been laid down by Congress to guide the discretion of the Sentencing Commission. To name only a few, Congress by legislative act set forth the goals and purposes of sentencing which should guide the Commission; specifically directed the Commission to establish guidelines to determine sentencing ranges and to set forth specific formulas for determining sentencing ranges, including a baseline; directed the Commission, in formulating offense categories, to consider specific factors, and prohibited consideration of other factors, 488 U.S. at 374-76; and, ''enumerated various aggravating and mitigating circumstances'' to provide some guidance to the Commission. *Id.* at 377.

[20]This Court in practice has demanded that delegations in the criminal context be far more specific than in others, *see, e.g., Mistretta* and *Touby,* but declared in *Touby* that ''[o]ur cases are not entirely clear as to whether or not more specific guidance is in fact required.'' 500 U.S. at 166. The Court declined to resolve the issue, however, because the statute involved in *Touby* ''passes muster even if greater congressional specificity is required in the criminal context.'' *Id.*

Likewise, the statute at issue in *Touby v. United States*, 500 U.S. 160 (1991), set forth principles for the Attorney General to follow in temporarily scheduling "designer drugs" as a controlled substance on an expedited basis in order "to avoid an imminent hazard to the public safety." *Id.* at 163-67. The statute required the Attorney General to consider multiple factors, and in addition, to satisfy the conditions of another section that identified criteria for adding a substance to each of five schedules. *Id.* Thus, this Court concluded: "Congress has placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct." *Id.* at 167.

Moreover, even assuming that the margin of indefiniteness of Congressional guidance is no different in delegations of legislative authority in the criminal context, it is certainly narrowed in capital cases. "Death . . . is in a class by itself," *Furman*, 408 U.S. at 289 (Brennan, J., concurring), and "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination," *California v. Ramos*, 463 U.S. at 998-99. The "heightened standard" of review required in capital cases, *see Simmons v. South Carolina*, ___ U.S. ___, 114 S.Ct. 2187, 2198 (1994) (Souter, J., joined by Stevens, J., concurring), makes clear that Congress has not laid down an intelligible principle to guide the President in establishing aggravating factors.

***B. U.C.M.J. article 36 does not address capital cases or Congressional policy or guidance for establishing the aggravating factors required to narrow the class of persons eligible for the death penalty.***

Unlike the statutes at issue in *Mistretta* and *Touby*, U.C.M.J. article 36 provides no statements of Congressional policy or factors to be considered in establishing



aggravating factors. Thus, even if Congress did intend to delegate authority to the President to establish aggravating factors for military capital trials, it did not provide any guidance whatsoever for the President to follow in doing so. Indeed, Congress did not even mention the death penalty.

The lack of Congressional guidance violates the Constitution because Congress allowed the President "virtually unfettered" discretion in establishing aggravating factors to be applied in capital cases. *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (authority conferred by legislative act which "supplies no standards" is "an unconstitutional delegation of legislative power"). The Constitution demands far more when deciding who shall receive the harshest criminal sanction known to the law.

*1. The instruction to follow "principles of law" applied in the United States District Courts provided no guidance to the President for establishing aggravating factors in capital trials.*

There were virtually no "principles of law" recognized in capital trials in the district courts at the time the President adopted R.C.M. 1004 in 1984. After this Court's opinion in *Furman* in 1972, the first Congressional enactment relating to the death penalty came in 1974 when Congress authorized the death penalty for aircraft piracy and set forth a list of aggravating factors, at least one of which had to be found, before a death sentence could be imposed. 49 U.S.C. §§ 1472 & 1473.[21] Congress did not

[21] 49 U.S.C. § 1472 was recodified as 49 U.S.C. § 46502 in July 1994. 49 U.S.C. § 1473 was recodified as 49 U.S.C. § 46503 in July 1994 and repealed in September 1994. The aggravating circumstances that now apply to aircraft piracy are found in 18 U.S.C. § 3592, which was enacted in September 1994.

enact any other death penalty legislation until after the President promulgated R.C.M. 1004. Thus, at the time of the President's action, the 1974 aircraft piracy legislation was the only available "principle of law," potentially relevant to Article 36(a), which pertained to aggravating circumstances to be applied in capital sentencing hearings in the United States District Courts.

In an attempt to skirt this dilemma, the government argued in its Brief in Opposition to the Petition for Writ of Certiorari that the "'principles of law' recognized by the district courts include constitutional rules established by this Court's capital punishment decisions." In addition, the government noted that this Court favorably cited the Model Penal Code[22] in *Gregg* and upheld the Georgia capital punishment scheme "which generally follows the Model Penal Code." BIO at 15-16. From this argument, the government sought to elicit *Congressional* guidance.

While the Court's opinions are certainly binding on United States District Courts, this Court has never created aggravating factors to be applied in capital cases. Indeed, this Court has specifically indicated that the determination of substantive aggravating factors and procedures to be used in capital cases is a decision that must be made by the legislatures of the various jurisdictions. *See, e.g., Blystone v. Pennsylvania,* 494 U.S. 299, 309 (1990). Moreover, while this Court has certainly found a number of aggravating factors to be constitutional in the last twenty-five years, these aggravating factors have no force of law except in the jurisdictions whose legislatures enacted them. In addition, while this Court may have cited the Model Penal Code with approval, it also has no force of law unless accepted by a legislature.

Even assuming, however, that this Court's opinions approving aggravating circumstances selected by state legislatures and listed in the Model Penal Code are

[22] ALI, Model Penal Code, § 210.6, pp. 107-10 (Rev. Ed. 1980).



included in the "principles of law" which the President is instructed to consider, at the time R.C.M. 1004 was created there were thirteen U.C.M.J. articles for which the death penalty was an authorized punishment and eleven of these articles related to purely military offenses which had no parallel in civilian jurisdictions.[23] Only two articles having death as an authorized punishment, Article 118 (murder) and Article 120(a) (rape), were comparable to civilian law. Thus, for eleven of the thirteen offenses the President was left with absolutely no guidance from the "principles of law" applicable in United States District Courts or even state courts. For the other two offenses, the President was left free to select at will from the smorgasbord of aggravating factors used by the states and the Model Penal Code or simply to create them.

Given these facts, the lower court's finding that the aggravating factors established by the President "reflect policy expressed by Congress in 'various statutes—including several punitive articles of the Uniform Code of Military Justice—and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty," J.A. 113-14, is of no legal significance. In the first instance, the "various statutes" enacted by Congress, upon which the lower court relied to find (or create) Congressional policy in support of R.C.M. 1004, do not (with the exception of Article 106a and 49 U.S.C. § 1472)

[23] Article 85(c), 10 U.S.C. § 885(c) (desertion in time of war); Article 90(2), 10 U.S.C. § 890(2) (willful disobedience of a lawful order in time of war); Article 94(b), 10 U.S.C. § 894(b) (mutiny, sedition, or failure to suppress or report a mutiny or sedition); Article 99, 10 U.S.C. § 899 (misbehavior before the enemy); Article 100, 10 U.S.C. § 900 (attempting to compel or compelling a commander to surrender); Article 101, 10 U.S.C. § 901 (improper use of countersign in time of war); Article 102, 10 U.S.C. § 902 (forcing a safeguard); Article 104, 10 U.S.C. § 904 (aiding the enemy); Article 106, 10 U.S.C. § 906 (spying in time of war); Article 110(a), 10 U.S.C. § 910(a) (improper hazarding of vessel); and Article 113, 10 U.S.C. § 913 (misbehavior of sentinel in time of war).

include aggravating factors to be applied when death is an authorized punishment. Therefore, these non-capital statutes cannot possibly reflect Congressional policy concerning aggravating factors to narrow the class of persons eligible for a sentence of death.

Secondly, Article 106a and 49 U.S.C. § 1472 provided no guidance to the President. The aggravating factors in Article 106a could not have been considered by the President in 1984 because they were not enacted until 1985. Similarly, although 49 U.S.C. § 1472 existed in 1984, the aggravating factors established by the President in R.C.M. 1004(c) have almost no similarity to the aggravating factors set forth by Congress in 49 U.S.C. §§ 1472 and 1473.

Finally, the extent (if any) to which the aggravating factors of R.C.M. 1004(c) conform to the standards set forth in the Model Penal Code and state statutes is irrelevant to the issues of *Congressional* intent and the rules established by Congress for application in the district courts. The question is not whether the aggravating factors found in R.C.M. 1004(c) would be constitutional if established in an appropriate manner. Rather, the issue is whether the President had authority *ab initio* to establish aggravating factors and whether Congress provided sufficient guidelines to exercise that authority. The Model Penal Code and state statutes shed no light on this inquiry and Congress could not, even if it intended to do so, simply instruct the President to refer to state laws or the Model Penal Code for guidance. *Cf. Washington v. W.C. Dawson,* 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920).



*2. Even assuming that the "principles of Law" Clause of U.C.M.J. article 36 provides some guidance to the President, the President is instructed to follow this guidance only in so far as "he considers practicable."*

Even if one assumes that U.C.M.J. article 36's reference to the "principles of law" applicable in United States District Courts gives some hint as to Congressional policy and provides some guidance to the President, he is free to follow this guidance only in so far as "he considers practicable."[24] Thus, the President is left with the liberty to pick and choose as he pleases. *See, e.g., Industrial Union Dep't v. American Petroleum Inst.,* 448 U.S. at 675, 682 (Rehnquist, J., concurring) (the language "to the extent feasible" excuses the delegate from the duty to follow the specific Congressional guidance given).

In this regard, petitioner's case is very similar to *Schecter Poultry.* In the National Industrial Recovery Act, Congress delegated authority to the President to establish codes of fair competition for the purpose of rehabilitation of industry and industrial recovery. However, Congress set forth only its broad policy and gave the President unfettered power. This Court found that although Congress stated a policy, it left the President with power to "impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act." 295 U.S. at 538-39. Thus, the Court found that even though Congress

[24] Although this language was included, some concern was expressed prior to enactment that the phrase "so far as practicable" is "dangerous" because "it completely nullifies everything that you have laid down." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st. Sess. (1949), *reprinted in* Index and Legislative History of the Uniform Code of Military Justice, at 1017 (1950) (Statement of Representative Charles Elston).

intended a delegation to the President, it left the President with unfettered discretion. The lack of Congressional guidance rendered the delegation unconstitutional. *Id.*

Even the lower court's opinion in *Curtis* indicates that the President exercised unfettered discretion without any guidance from Congress. In discussing the origin of each aggravating factor and its similarities with other laws, the lower court cited U.C.M.J. provisions, including Article 106a (which was not even in existence at the time the President selected aggravating factors for inclusion in R.C.M. 1004(c)); federal statutes; Article I of the Constitution; the law of war; the "Law of Nations;" this Court's opinions; state court opinions; state statutes; and its own opinions. J.A. 114-20. Clearly, the President was not acting pursuant to Congressional guidance, but in accordance with his own determinations and unfettered discretion as to what the aggravating factors should be.[25]

In *Solorio v. United States*, 483 U.S. 435, 447 (1987), this Court made clear that "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *See also Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline"). Even assuming that Congress implicitly delegated authority to the President, Congress has not taken responsibility for balancing individual rights against the government and has not established any intelligible principle for the President to follow. Rather, Congress granted the President complete discretion to apply any principles or rules that he chooses. The

[25] For instance, the aggravating factor that "the murder was committed with intent to obstruct justice," R.C.M. 1004(c)(7)(H), J.A. 136, has no similar provisions in any state or federal death penalty statute or the Model Penal Code.



Constitution demands much more in the exercise of legislative authority by the President which will ultimately result in the execution of servicemembers. *See generally Weiss v. United States*, ___ U.S. ___, 114 S.Ct. 752, 769 (1994) (Ginsburg, J., concurring) (quoting *Winters v. United States*, 89 S.Ct. 57, 59-60) (1968) (Douglas, J., opinion in chambers)) ("A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution").

## IV. PURSUANT TO THE DOCTRINE OF SEPARATION OF POWERS AND THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE ESTABLISHMENT OF AGGRAVATING FACTORS TO BE USED IN MILITARY CAPITAL CASES TO NARROW THE CATEGORY OF PERSONS ELIGIBLE FOR THE DEATH PENALTY IS A LEGISLATIVE DECISION VESTED EXCLUSIVELY IN CONGRESS AND CANNOT BE DELEGATED TO THE PRESIDENT.

In our tripartite system of government, the Congress shall write the laws (Article I), the Executive shall implement the laws (Article II), and the Judiciary shall interpret the laws (Article III). Moreover, "the intent of the Framers [was] that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). Article I, § 1, specifically vests "[a]ll legislative powers" in the Congress. While Congress may under some circumstances seek assistance from the other branches, the extent and character of that assistance is delineated by the structure of the Constitution, specific constitutional limitations, as well as by "common sense and the inherent necessities of the governmental co-ordination." *J.W.*

*Hampton, Jr. & Co. v. United States,* 276 U.S. at 406; *see also Union Bridge Co. v. United States,* 204 U.S. 364 (1907).

In the military context, just as in the civilian context, the Constitution provides that the Congress must make all laws, i.e., the Congress must legislate. U.S. Const. art. I, § 8, cl. 14. The Congress is specifically charged "to make rules for the government and regulation of the land and naval forces." *Id.* This unqualified power is as plenary as the other grants of authority in Article I, *Solorio,* 483 U.S. at 441, 446, and vests in "Congress, rather than the Executive, authority to make rules for the government of the military," *id.* at 446, "including, of course, the punishment of military offenses," Duke & Vogel, 13 Vand. L. Rev. at 447-48; *see also* Grant W. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses; An Analysis of O'Callahan v. Parker,* 54 Minn. L. Rev. 1, 18 (1969).

Likewise, in the military context, just as in the civilian context, the Constitution provides that the President is the executive or the Commander in Chief, i.e. the President must implement the laws. U.S. Const. art. II, § 2, cl. 1. The only difference in treatment for members of the armed forces contemplated by the Framers is that servicemembers are tried not by Article III courts but by courts created by the Congress under its Article I powers. *Weiss,* 114 S.Ct. at 755. Thus, in determining who shall make the laws and who shall implement them, the members of the military are not, and can not, be treated differently than other citizens of this country.



***A. Congress, as the elected representatives of this nation, must make the moral policy judgment to determine which servicemembers will be eligible for the death penalty.***

In the military context, just as in the civilian, Congress cannot delegate the power to make laws. As this Court declared in *Field v. Clark,* 143 U.S. 649 (1892):

> The true distinction. . .is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

*Id.* at 693-94 (quoting *Cincinnati, W. & Z.R. Co. v. Comm'rs of Clinton Co.,* 1 Ohio St. 77, 88-89 (1852)). This Court has recognized, however, that the Constitution does allow Congress some flexibility because "legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly." *Panama Refining Co. v. Ryan,* 293 U.S. 388, 421 (1935). More specifically, this Court has recognized in a number of instances that there are some areas:

> where Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency [or the President] to refine

those standards, "fill in the blanks," or apply the standards to particular cases.

*Industrial Union,* 448 U.S. at 675 (Rehnquist, J., concurring); *see also American Power & Light Co.,* 329 U.S. at 105. Establishing aggravating factors in capital cases, however, is not a broad field which is complex or technical or in which Congress needs expert assistance.

Since *Furman v. Georgia,* thirty-eight state legislatures have passed statutes authorizing capital punishment and setting forth the aggravating factors necessary to the determination of who shall live and who shall die. NAACP Legal Defense Fund, Inc., *Death Row, U.S.A.* (Summer 1995). In addition, Congress has enacted several statutes which establish aggravating circumstances to be applied in capital trials in the United States District Courts. 18 U.S.C. § 3592; 21 U.S.C. § 848. Finally, Congress has even enacted a statute, applicable to servicemembers, which establishes aggravating factors solely for the crime of espionage. U.C.M.J. article 106a. Thus, Congress is clearly capable of making these determinations.

While Congress must have some flexibility, especially when dealing with complex or technical issues in which expertise is required, this Court has never allowed Congress to avoid its responsibility to make *all* policy decisions and judgments which are commensurate with its role as the elected representatives of the American people, which includes balancing "the rights of men in the armed forces. . .[with] demands of duty and discipline." *Burns v. Wilson,* 346 U.S. 137, 139 (1953). As Justice Scalia has observed:

> It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded. Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.



*Mistretta,* 488 U.S. at 415 (Scalia, J., dissenting). Likewise, Chief Justice Rehnquist has observed that there are some "difficult issues," such as life and death decisions,[26] that confront Congress which it alone must decide because "Congress [is] the governmental body best suited and most obligated to make the choice." *Industrial Union,* 448 U.S. at 672 (Rehnquist, J., concurring). The decision concerning which members of the Armed Forces will be eligible for the death penalty is no doubt a policy and moral judgment which must be made by Congress. *See* argument *supra* at 19-20.

### *B. The President is not granted constitutional prerogative to take legislative action for the sake of expedience.*

The government in its Brief in Opposition to the Petition for Writ of Certiorari asserted that it is "sensible" for the President to establish aggravating factors because he is in the best position to act "quickly." BIO at 19. Undoubtedly, the legislative process is slow and cumbersome at times and is charged with political controversy. To accept the government's argument, however, and allow Congress to shift its legislative responsibility to the President is tantamount to ignoring the Constitution and the intent of the Framers. *See INS v. Chadha,* 462 U.S. at 951 (the Framers intended "that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure"); *Youngstown Sheet & Tube Co.,* 343 U.S. at 655 (Jackson, J.,

[26] The decision discussed by Chief Justice Rehnquist at the time was "whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths." *Industrial Union,* 448 U.S. at 672 (Rehnquist, J., concurring).

concurring) (''With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations'').

*1. The Framers of the Constitution intended that Congress, not the President, make the rules and regulations for the Armed Forces.*

The Framers of the Constitution were cognizant and fearful of military court-martials even for members of the military. As this Court recognized in *Reid v. Covert,* 354 U.S. at 23-24, ''The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history.'' *See also Lee v. Madigan,* 358 U.S. at 232 (''The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history'').

The Framers were mindful that English rulers tried to rule the country through the army and without the input of Parliament. Contrary to the common law, soldiers were tried in peacetime by court-martial for non-military offenses, including capital offenses. This pattern was continued until 1689 when the Declaration of Rights placed control of the military in the legislature. Duke & Vogel, at 444. Parliament exercised its authority by limiting the peacetime power of courts-martial over servicemembers. In the first Mutiny Act, Parliament allowed courts-martial, in peacetime, only for mutiny, sedition, and desertion which were punishable by death. *Solorio v. United States,* 483 U.S. at 442 (citing Mutiny Act of 1689, 1 Wm. & Mary, ch. 5).

This country's own history was marred by military excesses on behalf of the Executive. In the early days of



this nation, American colonists were tried by courts-martial and executed without regard to the existence of civil laws and civil courts to punish all offenses. *Reid,* 354 U.S. at 27-28 (citing 1 Wells, The Life and Public Services of Samuel Adams, 231). Because of this history, the Framers placed control of the military, including the policy judgments concerning the offenses and punishments to be applied in military courts, in Congress. Duke & Vogel, at 447-48. The ''profound fear and distrust of military power [under the control of the executive],'' is reflected in the plain language of the Constitution. *Reid,* 354 U.S. at 29 (citing Art. I, §§ 8 and 9; Art. II, § 2; Art. III; and Amendments II, III, V, and VI); *see also Solorio,* 483 U.S. at 446 (English history shows a strong desire to transfer the control of court-martial jurisdiction from the executive to the legislature, thus in our Constitution ''Congress, and not the Executive, was given authority to make rules for the regulation of the Armed Forces'').

*2. The Framers of the Constitution intended in the Eighth Amendment to prohibit all punishments that were not specifically authorized by the legislature.*

The specific language of the Eighth Amendment prohibits ''cruel and unusual punishments.'' While there has been much debate about other aspects of this amendment, it is clear that the Framers intended to prohibit all punishments that were not determined and specifically authorized by the legislature.

The precursor of the Eighth Amendment is the ''cruell and unusual Punishments'' clause of the English Declaration of Rights of 1689. *Harmelin v. Michigan,* 501 U.S. 957, 965 (1991) (Opinion of Scalia, J., joined by Rehnquist, C.J.). The English provision, in turn, was prompted by the abuses of Lord Chief Justice Jeffreys,

who while sitting as a judge during the Stuart reign of James II, created punishments that were not "authorized by the common-law precedent or statute." *Id.* at 968; *Furman v. Georgia,* 408 U.S. at 317-19 (Marshall, J., concurring). The Preamble to the Declaration of Rights declared that James II had endeavored to "subvert" the "laws and liberties of this kingdom" by arbitrarily "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of parliament." The Declaration then continued by denouncing "arbitrary and illegal courses" and "illegal and cruel punishments" in prosecutions in the Court of the King's Bench. Declaration of Rights, 1 Wm. & Mary, Sess. 2, ch. 2 (1689) (quoted in *Harmelin,* 501 U.S. at 969). These statements were prompted by a number of cases in which various types of punishment, which had not been authorized by common law or Parliament, were pronounced by Judges of the King's Bench. *Harmelin,* 501 U.S. at 969-71; *see also* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 Calif. L. Rev. 839 (1969).

The most prominent example of executive and judicial abuse of authority was the case of Titus Oates, who was convicted of perjury in 1685. He had been convicted of giving false testimony during the "Popish Plot" trials of 1678-79, and had been sentenced to be defrocked of his "Canonical Habits," to serve a term of life imprisonment, to pay a large fine, to be twice severely whipped, and to stand in the pillory at various times during the year. This sentence was illegal, however, in several specifics, including the fact that only an ecclesiastical court could strip a person of "Canonical Habits" and there were no precedents authorizing whipping or life imprisonment for perjury. *Id.* (citing 1 Journals of the House of Lords 367 (May 31, 1689), quoted in *Second Trial of Titus Oates,* 10 How. St. Tr. 1227, 1325 (K.B. 1685)). Four years later,



while the Declaration of Rights was pending in Parliament, Oates appealed his conviction to the House of Lords. Oates' conviction and sentence were affirmed by the House of Lords, over a vigorous dissent which declared that the punishments were "contrary to Law and ancient practice" and were "cruel, barbarous, and illegal." Members of the House of Commons then passed a bill to annul Oates' sentence and indicated clearly therein that the "cruel and unusual punishments" provision of the Declaration of Rights was passed to prevent just these types of abuses. *Id.* at 971-73 (citing 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

As Justice Scalia (joined by Chief Justice Rehnquist) observed:

> In all these contemporaneous discussions, as in the prologue of the Declaration, a punishment is. . .considered objectionable . . .because it is "out of [the Judges'] Power," "contrary to Law and ancient practice," without "Precedents" or "express Law to warrant," "unusual," "illegal," or imposed by "Pretense to a discretionary Power." Moreover, the phrase "cruell and unusual" is treated as interchangeable with "cruel and illegal." In other words, the "illegal and cruell Punishments" of the Declaration's prologue are the same thing as the "cruell and unusual Punishments" of its body.

*Harmelin,* 501 U.S. at 972 (internal citations and footnotes omitted). Thus, it is clear that the Eighth Amendment was intended to prohibit the Executive and the Judiciary from imposing criminal sanctions that were not recognized or established as legal by the Legislature. *See Gregg v. Georgia,* 428 U.S. at 169; *In re Kimmler,* 136 U.S. 436, 446-47 (1890).

Thus, the fact that it is easier and quicker for the President to establish aggravating factors in military capital

cases does not satisfy the constitutional concerns. The Framers of the Constitution were aware—and intended—that it be more difficult for the legislature to make law than to allow a single Executive to do so. *See* David Schoenbrod, Power Without Responsibility 29 (Yale Univ. Press 1993) (Framers created a "super majority" rule which requires both Houses of congress *and* the President to enact laws). As this Court has observed:

> the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmark—of democratic government.

*Chadha,* 462 U.S. at 944.

This is a country founded on fear of an executive who is too powerful, fear of an executive and judges authorizing sentences without authorization from the legislature, and fear of a military that tries citizens and soldiers in capital cases at will. *See Youngstown Sheet & Tube Co.,* 343 U.S. at 633 (Douglas, J., concurring) ("The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement"). Thus, it is strange that the United States Government argues that Congress need not make the determination of what aggravating factors will be used in military capital cases to determine which of our servicemembers shall live and which shall die. "[I]t is not too much to ask that the citizen army of a democracy be given that fundamental fair play and assurance of justice which our country is trying to give to the rest of the world." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. (1949), *reprinted in* Index



and Legislative History of the Uniform Code of Military Justice, at 640 (1950) (Statement of Richard H. Wels, Chairman, Special Committee of Military Justice of the New York County Lawyers' Association); *see also Middendorf v. Henry,* 425 U.S. at 63 (Marshall and Brennan, JJ., dissenting) ("denial of traditional rights to any group should not be approved without examination, especially when the group comprises members of the military, who are engaged in an endeavor of national service, frequently fraught with both danger and sacrifice").

"It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people." *Industrial Union,* 448 U.S. at 687 (Rehnquist, J., concurring). Congress must not be allowed to abdicate its responsibility as the voice of society's moral conscience. *Id.* at 686 (the Court "ought not to shy away from [its] judicial duty to invalidate unconstitutional delegations of legislative authority"). If the military is to execute servicemembers, then Congress must, by legislation establishing aggravating factors, make the moral determination of which servicemembers are to be subjected to a sentence of death. *See McGautha v. California,* 402 U.S. 183, 271 (1971) (Brennan, J., dissenting) ("A legislature that has determined that the [government] should kill some but not all persons whom it has convicted of certain crimes must inevitably determine how the [government] is to distinguish those who are to be killed from those who are not").

***C. Even assuming that Congress may delegate its legislative authority to establish aggravating factors in military capital cases, it may not make that delegation to the Commander in Chief because he already exercises executive and judicial control of the military.***

Although *Mistretta* does not control the outcome of this case,[27] this Court specifically recognized therein the dangers involved when Congress tries to confer upon the Executive the power to promulgate sentencing guidelines.[28] Such an attempt "unconstitutionally. . .unite[s] the power to prosecute and the power to sentence within one Branch." 488 U.S. at 391 n.17. The constitutional problem this Court anticipated in *Mistretta* is realized in petitioner's case.

Pursuant to his authority under Article II, § 2 of the United States Constitution, the President, as Commander in Chief of the Armed Forces, is ultimately responsible for the prosecution of all offenses committed by members of the Armed Forces. In addition, the President as Commander in Chief, supervises the convening authorities, who in turn convene the court-martial tribunal and select the members to determine both guilt and sentence. *See Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services,* 81st Cong., 1st Sess. (1949), *reprinted in*

[27] In *Mistretta*, this Court merely assumed "without deciding" that Congress could and had granted the Sentencing Commission authority in the capital case arena. 488 U.S. at 378 n.11.

[28] In *Mistretta*, Congress delegated authority to promulgate noncapital sentencing guidelines to an independent Sentencing Commission within the *judicial* branch rather than the Executive Branch, because:

> Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

H.R. Rep. No. 1017, 98th Cong. 2d Sess. 95 (1984).



Index and Legislative History of the Uniform Code of Military Justice, at 113-18 (statement by Committee on the Judiciary, United States Senate, on a Uniform Code of Military Justice).[29] Likewise, military judges at the trial and appellate levels are appointed as judges by The Judge Advocates General of the respective services, who are responsible to the President. *Weiss v. United States,* ___ U.S. ___, 114 S.Ct. 752 (1994); *see also Ryder v. United States,* ___ U.S. ___, 115 S.Ct 2031 (1995). Further, in addition to having the inherent constitutional power, Article II, § 2, cl. 1, to pardon or commute criminal sentences, *Schick v. Reed,* 419 U.S. 256, 266 (1974), the President is specifically assigned, under U.C.M.J. article 71(a), 10 U.S.C. § 871(a), the task of reviewing and approving all sentences of death once direct review by the military courts is completed and the sentence is affirmed or certiorari is denied by this Court.

To permit Congress to delegate its legislative authority to the President places within the Executive the power to determine the class of military offenders eligible for the death sentence, the power to determine that a military offender should receive the death penalty, the power to convene the court-martial and select both its members and the judge, and the final power to grant or withhold clemency once a petitioner's direct appeal is completed. This "blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid,* 354 U.S. at 39.

[29] During those hearings, it was observed:

> Not belonging to the judicial branch of the Government, it follows the courts martial must pertain to the executive department; and they are in fact simply instrumentalities of the Executive power, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein.

*Id.* at 115.

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Armed Forces.

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

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## QUESTION PRESENTED

Whether the President had the authority to promulgate Rule for Courts-Martial 1004 which prescribes aggravating factors for cases in which the death penalty is otherwise expressly authorized by the Uniform Code of Military Justice.

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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No. 94-1966

DWIGHT J. LOVING, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ARMED FORCES*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-227a) is reported at 41 M.J. 213. The initial opinion of the United States Army Court of Military Review, now the United States Army Court of Criminal Appeals (Pet. App. 229a-256a), is reported at 34 M.J. 956, and its opinion denying reconsideration (Pet. App. 257a-265a) is reported at 34 M.J. 1065.

### JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on November 10, 1994. A petition for reconsideration was denied on February 2, 1995. Pet. App. 228a. On April 21, 1995, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including June 2, 1995, and the petition was filed on that date. The petition

for a writ of certiorari was granted on September 27, 1995. 116 S. Ct. 39. The jurisdiction of this Court rests upon 28 U.S.C. 1259(1) (Supp. V 1993).

## STATUTES, RULE, AND CONSTITUTIONAL PROVISIONS INVOLVED

Articles 18, 36, 56, 106a, and 118 of the Uniform Code of Military Justice, 10 U.S.C. 818, 836, 856, 906a, and 918, and Rule for Courts-Martial 1004, are reprinted in the Joint Appendix, J.A. 139-145, 132-138. Relevant provisions of Articles I and II of the Constitution, and Article 55 of the Uniform Code of Military Justice, are reproduced in the appendix to this brief, *infra*, 1a-3a.

## STATEMENT

Petitioner was convicted by a general court-martial of premeditated murder, felony murder, attempted murder, and robbery (four specifications), in violation of Articles 118, 80, and 122 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 880, and 922. The court sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances. The United States Army Court of Military Review affirmed. 34 M.J. 956 (Pet. App. 229a-256a), reconsideration denied, 34 M.J. 1065 (A.C.M.R. 1992) (Pet. App. 257a-265a). The United States Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-227a.

1. In *United States* v. *Matthews*, 16 M.J. 354 (1983), the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) analyzed the constitutionality of Article 118 of the UCMJ, 10 U.S.C. 918, which authorizes the imposition of the death penalty on defendants who are found guilty of certain murders. The court concluded that *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), and its progeny, which assessed the constitutionality of state death penalty schemes, would apply without modification to the imposition of the death penalty in the military, at least when the



offense is not inherently military but has a civil analogue. 16 M.J. at 368-369.

After reviewing this Court's Eighth Amendment cases, the *Matthews* court concluded that certain features appeared in a constitutionally valid death penalty procedure: a bifurcated sentencing proceeding; specific aggravating circumstances to be identified by the sentencing authority; selection of and findings on the particular aggravating circumstances used by the sentencer to impose the death penalty; unrestricted opportunity for the defendant to present mitigation and extenuation evidence; and mandatory appellate review of the appropriateness of the sentence. 16 M.J. at 377. The court found all of those safeguards present in the military system except for a requirement that court members identify the specific aggravating factors upon which they relied in imposing the death penalty. *Id.* at 379. Because of the absence of that safeguard, the court reversed Matthews' death sentence. *Id.* at 381-382. The court concluded, however, that either Congress or the President, in his capacity as Commander-in-Chief and/or pursuant to the powers that Congress delegated to him, could remedy the defect. *Id.* at 380 (citing Article 36 of the UCMJ, 10 U.S.C. 836).

On January 24, 1984, "[b]y the authority vested in [him] as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code [*i.e.*, the UCMJ]," the President responded by promulgating an amendment to the extant *Manual for Courts-Martial* (*Manual*) that provided procedures for adjudicating cases in which the death penalty is authorized by the UCMJ. See Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984). When a new revision of the *Manual* was published later that year, the provisions of the Executive Order were included as Rule for Courts-Martial (RCM) 1004. See *Manual* (1984 ed.).[1]

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[1] Prior to the decision in *Matthews*, the Department of Defense announced and solicited comments on the proposed changes to the

Briefly summarized, RCM 1004 requires that, before a death penalty may be imposed following a general court-martial conviction of an offense for which Congress has expressly authorized the death penalty, the accused must have been notified, prior to trial, of the aggravating factors the prosecution intends to prove; the members of the court-martial must unanimously find the existence of at least one of the aggravating factors specified in the Rule; the accused must be given broad latitude to present evidence in extenuation and mitigation; and the members must concur that such extenuating or mitigating circumstances are "substantially outweighed" by any aggravating circumstances found to exist. See RCM 1004(b). In addition, the Rule prescribes a list of aggravating factors, some of which apply to all capital offenses, others of which apply exclusively to specifically enumerated crimes. See RCM 1004(c).

2. During the evening of December 11, 1988, petitioner, an Army private stationed at Fort Hood, Texas, robbed at gun point two different 7-Eleven convenience stores in Killeen, Texas. In the first robbery, petitioner fired two shots into the counter and soda fountain, which were behind the cashier; he obtained $38. In the second

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*Manual* it was then considering for recommendation to the President, which included RCM 1004. See 48 Fed. Reg. 23,688 (1983); *Matthews*, 16 M.J. at 381.

The *Manual* is an Executive Order. See Exec. Order No. 12,473 (Apr. 13, 1984), 49 Fed. Reg. 17,152 (1984), as amended by Exec. Order No. 12,484 (July 13, 1984), 49 Fed. Reg. 28,825 (1984). The Rules for Courts-Martial, which are part of the *Manual*, "govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities." See *Manual* II-1. The text of RCM 1004 was subsequently modified by additional Executive Orders. See Exec. Order No. 12,550 (Feb. 19, 1986), 51 Fed. Reg. 6497, 6498-6499 (1986); Exec. Order No. 12,767 (June 27, 1991), 56 Fed. Reg. 30,284, 30,293 (1991). The most recent revision of the *Manual* was issued in 1995. It included all amending Executive Orders by the President up to that time. Unless otherwise noted, citations to the *Manual* hereinafter are to the 1995 revision.



robbery, petitioner fired a bullet into the cash register, and demanded that the cashier put money in a paper bag. As he ran out, petitioner fired a round back into the store. He obtained approximately $52 from the second robbery. Pet. App. 3a, 231a.

When the 7-Eleven robberies netted him only a small amount of cash, petitioner conceived a plan to rob taxicab drivers. On the evening of December 12, 1988, he called a taxicab to take him from a store in Killeen to his barracks at Fort Hood. The driver of the taxicab was an active-duty soldier, Christopher Fay, who was working for extra money. Petitioner directed Fay to a secluded area on Fort Hood, where he demanded Fay's money at gun point. After receiving some money from Fay, petitioner shot him in the back of the head. "While looking at the hole in the back of the victim's head and the blood 'gushing out,'" Pet. App. 232a, petitioner cocked his pistol and again shot Fay in the back of the head, killing him. *Id.* at 3a-4a, 231a-232a.

Petitioner walked to his barracks and, after counting the money he obtained from Fay, called a second taxicab. That cab was driven by retired Army sergeant Bobby Sharbino. Petitioner directed Sharbino to a secluded street in Killeen, where he robbed Sharbino of his money pouch, wallet, and other personal effects. Petitioner then ordered Sharbino to lie down on a car seat and shot him in the head, killing him. Pet. App. 4a, 232a.

Later that evening, petitioner took his girlfriend to a nightclub in Killeen. Upon leaving, petitioner and his girlfriend entered a taxicab driven by Howard Harrison. After dropping his girlfriend off near her residence, petitioner directed Harrison to a secluded area and robbed him at gun point. Petitioner then attempted to kill Harrison. Harrison struggled with petitioner, disarmed him, and fled. Pet. App. 4a-5a, 232a-233a.

Acting on leads provided by Harrison, law enforcement agents, including agents of the Army Criminal Investiga-

tion Command (CID), arrested petitioner in the afternoon of December 13, 1988. Petitioner was taken to the CID office, where, after being advised of his rights, he made a full videotaped confession describing his crimes in detail. Searches of the area surrounding petitioner's girlfriend's residence, and of the residence and other places frequented by petitioner, resulted in the recovery of the weapon used in the murders and robberies, spent and unspent bullets, petitioner's blood-stained jacket, and effects taken from the murder victims. Pet. App. 5a, 6a-7a, 232a n.2, 233a. Later, while incarcerated at the U.S. Army facility at Fort Riley, Kansas, petitioner told a fellow inmate that he had committed the first murder "to see if he could get away with it," and the second murder "because it was fun." He subsequently added that, "if he had to do it over, the only difference is he wouldn't get caught." *Id.* at 68a-69a.

An eight-member general court-martial panel unanimously found petitioner guilty of the premeditated murder of Sharbino and of the felony murder of Fay. By a non-unanimous vote, the court-martial also found petitioner guilty of attempting to murder Harrison, of robbing Sharbino and Harrison, and of robbing the 7-Eleven stores. Pet. App. 8a-9a.[2] After a hearing conducted in accordance with RCM 1004, the court-martial unanimously found, as aggravating factors, that the premeditated murder of Sharbino was committed while petitioner was engaged in a robbery (see RCM 1004(c)(7)(B)); that, in the felony murder of Fay, petitioner acted as the triggerman (see RCM 1004(c)(8)); and that petitioner, having been found guilty of the premeditated murder of Sharbino, was found guilty of another murder in the same case (see RCM 1004(c)(7)(J)). Pet. App. 253a-254a. The court-martial unanimously sentenced petitioner to

[2] In addition, petitioner was also found guilty of the premeditated murder of Fay, the robbery of Fay, and the felony murder of Sharbino. After the findings were announced, the military judge dismissed those specifications as multiplicitous. Pet. App. 9a.



death, a dishonorable discharge, and forfeiture of all pay and allowances. The convening authority approved the findings and sentence. *Id.* at 9a, 230a.[3]

3. The Army Court of Military Review affirmed the findings and sentence. Pet. App. 229a-256a. In accordance with Article 66 of the UCMJ, 10 U.S.C. 866, the court independently weighed the evidence and "agree[d] with each of the aggravating factors found by the court-martial." Pet. App. 254a. The court also found "that any extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances." *Ibid.*

On appeal, petitioner argued that Article 118 of the UCMJ, 10 U.S.C. 918, is unconstitutional under *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), in that it does not sufficiently narrow the class of death-eligible defendants, and that the President exceeded his authority under the Constitution and the UCMJ in promulgating RCM 1004 to provide specific aggravating factors. The court found those claims foreclosed by *United States* v. *Curtis*, 32 M.J. 252 (C.M.A.) (J.A. 88-131), cert. denied, 502 U.S. 952 (1991). Pet. App. 230a.

The *Curtis* court concluded that, under the UCMJ, the President has long "play[ed] the major role in determining what punishments may be imposed by courts-martial." J.A. 107. It held that several provisions of the UCMJ, particularly Articles 18, 36, and 56, 10 U.S.C. 818, 836, and 856, authorized the President to promulgate aggravating factors for capital cases. J.A. 107-108. Relying on *Mistretta* v. *United States*, 488 U.S. 361 (1989), the *Curtis* court rejected a separation-of-powers challenge to

[3] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members, directs that the accused be tried by the court-martial for the charged offenses, and conducts a post-trial review of the proceedings. Upon such review, he is empowered to dismiss any charge or specification by setting aside the finding of guilty or "approve, disapprove, commute, or suspend the sentence in whole or in part." See Art. 60, UCMJ, 10 U.S.C. 860.

that authorization, noting that "[i]n view of [the President's] inherent constitutional authority [as Commander-in-Chief of the Army and Navy], a separation-of-powers objection has much less merit in the present context than if the 'aggravating factors' for capital cases tried by courts-martial had been formulated by a specially created commission." J.A. 106. *Curtis* also rejected the contention that Congress failed to give the President an intelligible principle for the exercise of his authority, explaining that adequate standards are furnished by the UCMJ's direction in Article 36(a) that the President "shall, so far as he considers practicable," apply "the principles of law" that are generally recognized in the trial of criminal cases in federal district courts. J.A. 113-122.

4. The Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-227a. The court summarily rejected, on the authority of *Curtis* and *Matthews*, petitioner's claims that the President lacked constitutional and statutory authority to promulgate RCM 1004. Pet. App. 141a-142a.

## SUMMARY OF ARGUMENT

Article 118 of the Uniform Code of Military Justice (UCMJ) expressly provides that a servicemember who commits premeditated or felony murder "shall suffer death or imprisonment for life as a court-martial may direct." 10 U.S.C. 918. Rule for Courts-Martial (RCM) 1004, first promulgated by the President in 1984, provides that only a sub-class of those eligible for the death penalty under Article 118—*i.e.*, those who are guilty of certain forms of aggravated conduct—may be sentenced to death by a court-martial. The President's action was authorized by other provisions of the UCMJ and by the President's own powers under Article II of the Constitution. It does not violate the separation-of-powers doctrine or the Eighth Amendment.

A. The UCMJ authorizes the President's action because Articles 18 and 56 of the UCMJ provide that the



President may limit the punishment that courts-martial may impose, including—as Article 18 makes clear—"the penalty of death when specifically authorized by" the UCMJ. 10 U.S.C. 818, 856. Article 36(a) further provides that the President may prescribe "post-trial procedures" for cases arising under the UCMJ to conform to the "principles of law * * * generally recognized" in the trial of federal criminal cases. 10 U.S.C. 836(a). In addition, the constitutional powers conferred on the President as Commander-in-Chief independently authorize him to regulate military punishments, within the bounds authorized by statute, because such punishments always have been understood to be an aspect of military obedience and discipline. Because the Constitution also enjoins the President to "take Care that the Laws be faithfully executed," Art. II, § 3, it was especially appropriate for him to exercise his statutory and constitutional authority to promulgate RCM 1004, because by so doing he removed arguable Eighth Amendment defects in the procedures by which Article 118 is implemented and thereby ensured that it is enforced as contemplated by Congress.

There is no merit to petitioner's argument that under separation-of-powers principles Congress alone may promulgate aggravating factors. This Court has long recognized that it is appropriate for Congress to grant the President broad authority in areas in which the Constitution also gives him independent power to act. That principle applies with special force with respect to the armed forces and the President's role as their Commander-in-Chief, and Congress has a long-standing practice of leaving the regulation of military punishments, including death when authorized by statute, to the Executive. Nothing in the Eighth Amendment requires a different conclusion, because this Court has never construed that provision to embody its own separation-of-powers doctrine.

B. There is no greater merit to petitioner's claim that the UCMJ's grant of authority to the President is not

cabined by constitutionally adequate standards. In enacting Articles 18 and 56, Congress must have contemplated that the President would exercise his authority to limit sentences by reference to the considerations that traditionally have controlled similar exercises of his discretion, including the needs of military discipline, and the policy of providing for evenhanded imposition of court-martial punishments across the country. Article 36(a) gives the President additional guidance by referring him to "principles of law * * * generally recognized" by federal district courts. Those principles include the Eighth Amendment decisions of this Court and other death penalty statutes on which the President relied in promulgating RCM 1004.

## ARGUMENT

### THE PRESIDENT PROPERLY PROMULGATED RULE FOR COURTS-MARTIAL 1004 TO LIMIT THE CLASS OF CASES IN WHICH THE DEATH PENALTY, WHEN IT OTHERWISE IS EXPRESSLY AUTHORIZED BY THE UNIFORM CODE OF MILITARY JUSTICE, MAY BE IMPOSED

The linchpin of the arguments advanced by petitioner and his amici is the assumption, nowhere demonstrated, that *Furman* v. *Georgia*, 408 U.S. 238 (1972), and its progeny, rendered Article 118 of the UCMJ, 10 U.S.C. 918, in which Congress expressly authorized the death penalty for certain murders committed by military personnel, a nullity. Because of that assumption, petitioner contends that the President must be deemed to have defined new crimes punishable by death—*i.e.*, to have prescribed "what acts would be punished as criminal offenses and what the punishment should be for those offenses." Pet. Br. 6; see also ACLU Br. 7. That assumption, however, is wrong. See, *e.g.*, *Dobbert* v. *Florida*, 432 U.S. 282, 297-298 (1977).[4] *Furman* and its progeny held that

[4] *Dobbert* rejected the defendant's argument that there "was no death penalty 'in effect' in Florida" at the time of his crime because Florida had not yet acted to comply with the dictates of *Furman*. *Dobbert* accordingly upheld retroactive application to the defendant of that State's post-*Furman* capital sentencing law on the ground that the changes were merely procedural. 432 U.S. at 296, 297.



the Eighth Amendment prohibits the imposition of the death denalty under procedures that create a substantial risk that it will be inflicted in an arbitrary manner. See *e.g.*, *Lewis* v. *Jeffers*, 497 U.S. 764, 774 (1990). Those cases did not rule unconstitutional Congress's judgment that death is a lawful punishment for premeditated or felony murder in the military justice system.[5] Instead, as the Court of Military Appeals recognized in *United States* v. *Matthews*, 16 M.J. 354 (1983), those cases require only that appropriate safeguards exist in order for a death penalty statute to be *implemented* in a constitutional manner—*i.e.*, that the fact-finder's judgment reasonably separate the murder committed by the defendant from the general class of all murders. See, *e.g.*, *Tuilaepa* v. *California*, 114 S. Ct. 2630, 2634-2635 (1994); *Romano* v. *Oklahoma*, 114 S. Ct. 2004, 2009 (1994); *Lowenfield* v. *Phelps*, 484 U.S. 231, 244 (1988).[6]

[5] See *Schick* v. *Reed*, 419 U.S. 256, 260, 267 (1974) (expressly leaving undecided whether *Furman* analysis applies to the military); cf. *Stanford* v. *Kentucky*, 492 U.S. 361, 372 n.4 (1989) (citing Article 118 as appropriately informing decision whether there is a national consensus against execution of underage offenders, thereby apparently assuming that Article 118 remains in effect); *Weiss* v. *United States*, 114 S. Ct. 752, 760-761 (1994) (noting that the constitutional tests and limitations applicable in the military context may differ from those the Court has developed for civilian society).

[6] While we need not quarrel here with *Matthews'* limited holding that the Constitution requires additional findings as to aggravation in cases brought under Article 118, this Court's subsequent cases have cast doubt on the court's imposition of that requirement. In *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), this Court held that the "narrowing" required by the Eighth Amendment may be inherent in the definition of the crime and occur at the penalty phase. See *Tuilaepa*, 114 S. Ct. at 2634-2635; *Romano*, 114 S. Ct. at 2009. In enacting Article 118, Congress could reasonably have concluded

Thus, contrary to petitioner's basic submission (Br. 39-43), Congress in this case *has* exercised its constitutional authority to "creat[e] [the] offense[] [and] fix[] * * * the punishment therefor," *Kinsella* v. *Singleton*, 361 U.S. 234, 246 (1960); see *Solorio* v. *United States*, 483 U.S. 435, 438-439 (1987), by providing in Article 118 that any servicemember guilty of premeditated murder or felony murder may be sentenced to death. "The statute, not the [President], fixes the penalty," *United States* v. *Grimaud*, 220 U.S. 506, 522 (1911), and the President, "in order to administer the law and carry the statute into effect," did "not go outside of the circle of that which the [UCMJ] itself ha[s] affirmatively * * * treated as unlawful if done." *Id.* at 518. That power to make the UCMJ system work in light of judicial rulings and other changed circumstances was clearly conferred on the President by the Constitution and by "entirely appropriate delegations of discretionary authority by Congress." *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 222 (1989) ("without doubt" Congress may confer upon the Executive "the authority to prescribe all needful rules and regulations" for the enforcement of the Internal Revenue Code, "including all rules and regulations as may be necessary by reason of any alteration of law") (internal quotation marks omitted).

In addition to his constitutional authority as President, three specific provisions of the UCMJ make clear that the President has the power to restrict the class of defendants who may be sentenced to death in the military jus-

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that those whom the government trains to kill have a special obligation of restraint that makes their commission of murder more morally culpable than the general class of homicides committed by a civilian. Such a breach of trust also impairs the effectiveness of an essential government function, because it undermines public confidence in the armed forces on which the citizenry depends for its security. Those factors serve to make Article 118 applicable "only to a subclass of defendants convicted of murder." *Tuilaepa*, 114 S. Ct. at 2635.



tice system. Article 18, 10 U.S.C. 818, which sets forth the jurisdiction of general courts-martial, provides that such courts-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter." Article 36(a), 10 U.S.C. 836(a), empowers the President to prescribe "trial[] and post-trial procedures * * * for cases arising under [the UCMJ] triable in courts-martial" by regulations that "shall, so far as [the President] considers practicable, apply the principles of law * * * generally recognized in the trial of criminal cases in the United States district courts." And Article 56, 10 U.S.C. 856, authorizes the President to limit the maximum punishment a court-martial may impose.

Those provisions plainly authorize the President to provide that fewer than all the defendants whom Congress has made eligible for the military death penalty may actually suffer that punishment, by incorporating into the Rules for Courts-Martial (RCM) the procedures that this Court's Eighth Amendment cases have upheld as constitutionally sufficient in the civilian context. The President's decision to exercise his constitutional and statutory authority in that manner not only removed any arguable Eighth Amendment infirmity in how the military death penalty is implemented,[7] but also is consistent with Congress's long-standing practice, dating back to the framing of the Constitution, of confiding similar decisions to the judgment of the Executive.

### A. Nothing In The Constitution Requires That Congress Itself Determine Which Capital Defendants Are Executed

Petitioner contends (Br. 7-16, 37, 42-43) that the Framers of the Constitution gave Congress the exclusive

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[7] Significantly, petitioner makes no claim that the aggravating factors promulgated by the President in RCM 1004 would fail to satisfy the Eighth Amendment's requirement of "narrowing" if those factors had been enacted by Congress.

authority to promulgate rules, regulations, and punishments to be applied by courts-martial, that the Framers never intended "the President's powers to be broad enough to establish policy or rules for the government and regulation of courts-martial," Br. 10, and that accordingly the President's exercise of such "legislative" authority in promulgating RCM 1004 violates the nondelegation doctrine and the Eighth Amendment. There is no merit to those claims, which ignore not only the President's independent role in the constitutional scheme but also 200 years of our Nation's history.

1. There is no basis for petitioner's suggestion (Br. 7-8) that, because Article I vests in Congress the authority to make rules for the government of the armed forces, Congress's ability to seek the aid of the Executive in this area is subject to special restrictions. See *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. at 220-221 (no distinction in Article I powers, including power to "raise and support Armies" or to " 'make Rules for the[ir] Government' * * * in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive"); see also *id.* at 222-223. Here, far more pertinent than the specific head of Article I power invoked by Congress is the long-standing principle that the limits on Congress's ability to confer authority on the Executive Branch—under *any* of its Article I powers—are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975) (delegation to Indian tribe of authority to regulate liquor, which gave rise to federal criminal penalties); see also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950) (immigration); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 12 (1926) (Commander-in-Chief power); *Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382, 387-388 (1813) (foreign affairs).



That principle is illustrated by *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). In that case, Congress had given the President authority to prohibit arms sales to warring South American countries, with whatever exceptions he might prescribe, if he should conclude that such a prohibition would "contribute to the re-establishment of peace" there. *Id.* at 312. That authorization was attacked as an impermissible delegation of legislative power that was "controlled by no standard." *Id.* at 314-315. Emphasizing the "unbroken legislative practice * * * almost from the inception of the national government," *id.* at 322, which provided for the President to exercise primary control over matters involving foreign affairs, this Court rejected that challenge:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations * * *.

*Id.* at 319-320. The Court made the same point in *Knauff*, in rejecting an alien's challenge to her exclusion from the United States pursuant to authority delegated by statute to the President:

> [T]here is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. * * *
>
> * * * Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, *e.g.*, as was done here, for

> the best interests of the country during a time of national emergency.

338 U.S. at 542-543.

The same is true here, because the authority exercised by the President is "cognate to the conduct by him," *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 422 (1935), of his constitutional duties. "The power of the executive to establish rules and regulations for the government of the army, is undoubted," *United States* v. *Eliason*, 41 U.S. (16 Pet.) 291, 301 (1842), because the Constitution "invests the President, as Commander in Chief, with the power to * * * carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces." *Ex parte Quirin*, 317 U.S. 1, 26 (1942); see also *Kurtz* v. *Moffitt*, 115 U.S. 487, 503 (1885) (army regulations providing rewards for the capture of deserters "derive their force from the power of the President as commander-in-chief, and are binding upon all within the sphere of his legal and constitutional authority"); William Winthrop, *Military Law and Precedents* 31 (2d ed. 1920) (Commander-in-Chief "may, in the due execution of the laws for the government of the army, make needful and proper regulations without any legislative authority whatever"); *id.* at 27, 59.

The Commander-in-Chief's constitutional authority easily encompasses the regulation, within prescribed statutory bounds, of punishments imposed in the military. As the Court of Claims noted in a landmark case, in which this Court later concluded that the President has inherent power to convene courts-martial in the absence of legislation expressly prohibiting him from doing so:

> [T]here remains the significant fact in our military system that the President is always the commander in chief. Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force Congress can not take away from the President the supreme command. * * *



> * * * The power to command depends upon discipline, and discipline depends upon the power to punish * * *. If the President has no authority in matters pertaining to military tribunals unless it be "expressly" granted by Congress, then Congress * * * could practically defeat the express declaration of the Constitution and strip the office of commander in chief of all real powers of command.

*Swaim* v. *United States*, 28 Ct. Cl. 173, 221-222 (1893), aff'd, 165 U.S. 553, 566 (1897) ("We have felt constrained to, at least briefly, consider the several propositions urged upon us * * *, though we might well have contented ourselves with a reference to the able and elaborate opinion of the Court of Claims.").[8]

It is especially appropriate for the President to exercise that power in order to ensure that criminal statutes duly enacted by Congress in this setting—such as Article 118 of the UCMJ—are enforced in accordance with constitutional guarantees. Article II of the Constitution, in addition to providing that the "President shall be Commander in Chief of the Army and Navy," Art. II, § 2, Cl. 1, imposes on the President the duty to "take Care that the Laws be faithfully executed," Art. II, § 3, and he must swear or affirm that he will "faithfully execute the Office * * * and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." Art. II, § 1, Cl. 8. See also *In re Neagle*, 135 U.S. 1, 63-

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[8] In affirming, this Court also quoted at length from an 1835 report by the Senate Judiciary Committee. That report noted that the 1806 Articles of War, in expressly authorizing certain named officers to convene courts-martial, did not intend to "exclude the inherent power residing in the President of the United States under the Constitution. * * * [Those articles] do not in any manner control or restrain the commander-in-chief of the army from exercising the power which the committee think, in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised." 165 U.S. at 557-558.

68 (1890); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) ("we must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government' "). Those constitutional duties surely enable the President to use his authority as Commander-in-Chief, and all authority conferred upon him by statute, to eliminate any procedural infirmities in the administration of the punitive articles of the UCMJ, so as to allow for those articles to be "faithfully executed" and to retain the force Congress intended them to have in the governance of the armed forces.

Indeed, the appropriateness of Congress's entrusting the Commander-in-Chief, in light of his special place in the constitutional scheme, with special duties with respect to the armed forces was recognized by this Court as early as 1827, in *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19. The Court rejected Mott's challenge to the jurisdiction of the court-martial that had convicted him for failing to serve in the New York militia, which had been called into service by the President during the War of 1812 in accordance with a statute authorizing him to do so when he "judge[d] [it] necessary to repel [an] invasion." *Id.* at 31. Speaking through Justice Story, the Court rejected (*id.* at 32) Mott's attempt to apply to "the delegation and exercise of this power" the "same principles * * * as might be applied to the humblest officer in the government":

> The power itself is confided to the executive * * *, to him who is, by the constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. * * * It is no answer, that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, * * * the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.



*Id.* at 31-32.[9]

2. That the President may exercise the type of authority at issue here is also confirmed by Congress's long-standing practice, from the founding of our Government, of deferring to the President (or his subordinate, the court-martial) on questions of military discipline and punishment, including the circumstances that warrant the penalty of death when otherwise authorized by statute. "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 412 (1928); see also *Curtiss-Wright Export Corp.*, 299 U.S. at 327-329; *Stoutenburgh* v. *Hennick*, 129 U.S. 141, 147 (1889) (upholding grant of lawmaking power to District of Columbia since "the cre-

[9] Justice Story went on to reject Mott's claim—which recalls petitioner's argument that the President's power should be more circumscribed in peacetime—that he should not have been tried by court-martial "three years and more after the war was concluded, and in a time of profound peace." 25 U.S. (12 Wheat.) at 37. In words equally applicable to petitioner's effort to qualify the unrestricted language of the UCMJ, Justice Story noted that the power conferred by the statute at issue was not "in any shape dependent upon the fact of war or peace." *Ibid.*

ation of municipalities exercising local self-government" is sanctioned by "immemorial practice").[10]

At the inception of the American Revolution, the British Articles of War then in effect defined offenses subject to trial by court-martial but directed that, in the case of most offenses, the defendant be punished "according to the Nature of his Offence at the Discretion of the Court-martial." See British Articles of War of 1765, Section VI, Art. II, *reprinted in* Winthrop, *supra*, App. VII at 934 (absence without leave). The Second Continental Congress adopted a similar system for imposing punishment following a court-martial conviction. Thus, the American Articles of War of 1775, which were based upon the British Articles, see *Manual For Courts-Martial, U.S. Army 1917* at ix, likewise defined offenses subject to trial by court-martial but vested the court with almost unfettered discretion in fixing punishment.[11] The following year, when the Continental Congress adopted a new set of articles, it again afforded to courts-martial similar discretion in determining an appropriate punishment.[12] Under the Articles of Confederation, the Congress continued this practice when, in 1786, it adopted "Rules and Articles for the administration of justice in the holding of courts-martial." See, *e.g.*, American Articles of War of

[10] See also *Mistretta* v. *United States*, 488 U.S. 361, 390 (1989); *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986); *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 678 (1970); *Field* v. *Clark*, 143 U.S. 649, 691 (1892).

[11] See, *e.g.*, American Articles of War of 1775, Art. VII, *reprinted in* Winthrop, *supra*, App. IX at 954 (defendant, upon conviction for striking or disobeying superior officer, "shall suffer such punishment as shall, according to the nature of his offence, be ordered by the sentence of a general court-martial").

[12] See, *e.g.*, American Articles of War of 1776, Section VI, Art. 1, *reprinted in* Winthrop, *supra*, App. X at 963 (upon conviction for desertion, defendant "shall suffer death, or such other punishment as by a court-martial shall be inflicted").



1786, Art. 12, *reprinted in* Winthrop, *supra*, App. XI at 973 (persons causing riots in order to disturb court-martial proceedings to be "punished at the discretion of the said court-martial").

The adoption of the Constitution and the Bill of Rights did not alter the antecedent understanding concerning the proper allocation of sentencing responsibility in courts-martial between the Congress and the Executive. While Secretary of War Knox noted in 1789 "that the change in the Government of the United States will require that the articles of war be revised and adapted to the constitution," Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1, 8 (1958) (Wiener I) (quoting I *American State Papers Military Affairs* 6 (Lowrie & Clarke eds., 1832)), the First Congress evidently did not conclude that any significant revisions would be required, because it continued the Continental Articles of War without change in 1789, see Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96, and simply reenacted them again in 1790 "as far as [they] may be applicable to the constitution of the United States." Act of Apr. 30, 1790, ch. 10, § 13, 1 Stat. 121; see also Act of July 1, 1797, ch. 7, § 8, 1 Stat. 525 (same for navy).

Congress continued to rely on established military law in new articles for the government of the navy, which were adopted in 1799. Those articles "follow[ed] the Continental articles closely," were adopted "without a word of recorded debate," Wiener I, *supra*, 72 Harv. L. Rev. at 14, and provided categorically that "[a]ll murder shall be punished with death," Act of Mar. 2, 1799, ch. 24, § 1, Art. 29, 1 Stat. 713—a punishment that was made discretionary one year later.[13] Indeed, no significant

[13] In 1800, Congress adopted new rules for the government of the navy, which authorized, but did not require, the death penalty in cases of murder committed "without the territorial jurisdiction"

debate on the question of military punishments occurred until 1805, when Congress undertook a more detailed review and revision of rules for the government of the army in order to "adapt[] [them] to the provisions under the present government." 15 Annals of Cong. 263 (1805) (statement of Rep. Varnum); see also Wiener I, *supra*, 72 Harv. L. Rev. at 8.

During debate in the House of Representatives the following year, Representative Campbell of Tennessee repeatedly moved to strike the death penalty as a punishment that could permissibly be imposed by courts-martial. According to the Annals of Congress:

> In support of this amendment, Mr. Campbell reprobated the idea of the lives of citizens being in the power of a court martial. He compared soldiers to mere machines, from the severity of the military law; he said almost every article in the bill was stained with blood; he drew a parallel between them, and the civil penal laws; and that when men know how small offences subjected them to death, they would be deterred from or disgusted in serving their country.

15 Annals of Cong. 326 (1806); see *Kinsella*, 361 U.S. at 248-249. That proposal was "strenuously opposed" (15 Annals of Cong., 326 (1806)) by other members of the House, who were veterans of the Revolutionary War. See Wiener I, *supra*, 72 Harv. L. Rev. at 20. Those members

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of the United States. See Act of Apr. 23, 1800, ch. 33, § 1, Art. XXI, 2 Stat. 48. Other provisions of the 1800 articles, however, appeared to incorporate that punishment for offenses committed in the United States. See Art. XVII, 2 Stat. 47 ("All offences committed by persons belonging to the navy while on shore, shall be punished in the same manner as if they had been committed at sea."); Art. XXXII, 2 Stat. 49 ("All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea.").



> represented the necessity of the bill standing as it had hitherto done in this respect. They drew a picture of the Army without discipline, where every soldier might think himself at his own disposal—of an army being ordered to attack the enemy, and an officer refusing, and drawing his sword on his commanding officer. The necessity of a code of laws for the military differing from the civil law was demonstrated; and having, by the law as it stands, gone through the Revolutionary war with success, and in peace found no ill consequence arising therefrom, they thought it neither prudent nor safe to adopt the amendment.

15 Annals of Cong. 326-327 (1806).[14] Representative Campbell's motion lost. *Id.* at 327.

Six days later, when the proposed articles of war were again read, Mr. Campbell "moved to recommit the bill to a select committee, with the view of modifying it so as to render more definite the powers of courts martial, and particularly that the power of inflicting the punishment of death should be more guardedly bestowed." 15 Annals of Cong. 338 (1806). That motion, too, was rejected, and the bill passed as proposed. *Ibid.* In the Senate, the only controversy as to punishment resulted from the House's reduction of the number of lashes allowable for certain infractions. The House view prevailed, and the Senate approved the bill as well. President Jefferson signed it on April 10, 1806. See Wiener I, *supra*, 72 Harv. L.

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[14] The principal spokesman on behalf of the opponents of Representative Campbell's amendment was Representative Tallmadge of Connecticut, who had been a prominent officer in the Continental Army and a confidant of General Washington. See *Dictionary of American Biography* 284-285 (1936). Representative Tallmadge "brought forward * * * instances of danger, when soldiers were not subject to severe laws. Soldiers, he observed, were a description of men that must be ruled with severity—and though officers were invested with this authority, they were ever careful in exerting it." 15 Annals of Cong. 327 (1806).

Rev. at 21-22. In the end, the new Articles of War—which were intended to adapt military law to the dictates of the Constitution, and which largely remained substantively unchanged until 1916, see *id.* at 19 & n.138—continued the pre-constitutional practice of defining offenses but affording to courts-martial almost unfettered latitude in fixing punishment, including death where authorized by statute.[15]

In 1890, Congress initiated the practice of directing the President, rather than the court-martial itself, to fix the maximum allowable punishment whenever the sentence was left to the discretion of the court-martial by the Articles of War. See Act of Sept. 27, 1890, ch. 998, 26 Stat. 491. The House Committee Report that accompanied the draft legislation explained that "[a]t the present time courts-martial sitting in different parts of the country, without a common superior, adjudge and impose very unequal penalties for the same offense, and often, it is believed, excessive penalties." H.R. Rep. No. 1051, 51st Cong., 1st Sess. 1 (1890). In urging the legislation's enactment, the Committee added:

> In such offenses the committee believe that there should be some common standard, and think it very fit that the Commander-in-Chief should have the power to prescribe the limit.

*Ibid.*; see also Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 657 (Art. 45) ("Whenever the punishment for a

[15] See Act of Apr. 10, 1806, ch. 20, § 1, Art. 7, 2 Stat. 360 (upon conviction of mutiny, defendant "shall suffer death, or such other punishment as by a court martial shall be inflicted"); Art. 9, 2 Stat. 361 (same—striking or disobeying a superior); Art. 20, 2 Stat. 362 (same—desertion). To the same effect were the American Articles of War of 1874, which made only minor changes to the 1806 enactment, see Wiener I, *supra*, 72 Harv. L. Rev. at 19 n.138. See Winthrop, *supra*, App. XIII at 989 (Arts. 41-46) (each providing that the defendant "shall suffer death, or such other punishment as a court-martial may direct").



crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe").[16] The President's authority to limit punishments extended to the crimes of murder and rape, which were triable by court-martial—except when they were committed within the United States in time of peace—and which under Article 92 of the 1916 Articles of War were punishable by "death or imprisonment for life, as a court-martial may direct." 39 Stat. 664.

In enacting the UCMJ in 1950, Congress repealed the statutory limitations (as to geography and the existence of war) on a court-martial's jurisdiction to try servicemembers for murder, see Art. 118, 10 U.S.C. 918, and it continued its long-standing practice of granting the President discretion to establish, within statutory limits, appropriate sentences and sentencing procedures in courts-martial, see Arts. 18 and 56, 10 U.S.C. 818 and 856. The Rules for Courts Martial, in reliance on that authority, limit the permissible punishments in detail for capital and noncapital offenses alike.[17] See *United States ex rel.*

[16] Pursuant to the authority conferred by the 1890 Act, as reenacted in 1916, President Wilson issued an Executive Order on December 15, 1916, prescribing in detail the maximum sentences (including dishonorable discharge, periods of confinement at hard labor, and forfeiture of pay) for numerous offenses, often calibrated according to the circumstances of the particular offense. See *Manual for Courts-Martial, U.S. Army 1917* at 161-169 (reprinting Executive Order). The 1917 Manual also included further standards for sentencing within the maxima prescribed by the President, taking into account prior convictions, the presence or absence of extenuating or aggravating circumstances, and the individual characteristics of the accused. *Id.* at 159-160 (§§ 342, 343).

[17] The President has exercised his authority to regulate punishments imposed by courts-martial by specifying the types of punishment that may be imposed, RCM 1003, and by providing a maximum punishment for each offense within the maxima established by

*Toth* v. *Quarles*, 350 U.S. 11, 20 (1955) ("punishment can be raised or lowered at the will of the President"). In so doing, those rules do nothing more than continue an unbroken practice that predates the Constitution itself, and that shows that Congress has always understood the determination of an appropriate court-martial sentence, within maxima established by statute, properly to rest within the competence of the President and his subordinate officials who are the most directly responsible for the maintenance of discipline within the armed forces. Compare *Mistretta* v. *United States*, 488 U.S. 361, 395 (1989).

3. Petitioner and his amici contend, however, that the Framers specifically intended that the Constitution would preclude the President from playing that role in "peacetime" with respect to "civilian" capital offenses. Pet. Br. 13-16; Navy Br. 7-12. That attempt to construct a historical argument to support petitioner's proposed rule is deeply flawed and anachronistic in several respects.

The Fifth Amendment categorically exempts cases "arising in the land or naval forces" from its requirement of a grand jury indictment in every "capital or otherwise infamous crime," which persuasively demonstrates that the Framers contemplated that capital cases of all descriptions—not merely those involving "military" offenses—could be adjudged by the military justice system. The Fifth Amendment also demonstrates that the Framers well knew how to make the existence of war or peace relevant to a servicemember's constitutional protections, because it states that a member of the militia may be deprived of his right to a grand jury indictment only "when [the militia is] in actual service in time of War or public danger." This Court has repeatedly rejected attempts to

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Congress. See *Manual* Part IV paragraph (e) for each offense & App. 12 (Maximum Punishment Chart). In addition, in some cases, the President has defined aggravating circumstances that warrant increased punishment. See, *e.g.*, RCM 1003(d).



extend to the regular army and navy that "wartime" limitation. See, *e.g.*, *Johnson* v. *Sayre*, 158 U.S. 109, 114-115 (1895); *Ex parte Mason*, 105 U.S. 696, 700-701 (1881).[18] Petitioner's attempt to impute to the Framers a special concern with shielding soldiers from the punishment of death is further belied by the legislative debates on the 1806 Articles of War, and in the end completely disregards the fact that significant constitutional restrictions on the permissibility of the death penalty even with respect to civilians are a relatively recent development in our history. See, *e.g.*, *McGautha* v. *California*, 402 U.S. 183, 207 (1971).

In addition, petitioner's emphasis on the "civilian" nature of his capital offense is nothing but an attempt to revive the "service connection" requirement that was rejected by the Court in *Solorio*, *supra*; accord *Smith* v. *Whitney*, 116 U.S. 167, 183-184 (1886) ("Under every system of military law" court-martial jurisdiction extends to punishable acts, "whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business"). According to petitioner, that requirement makes sense in this context because Congress decided only relatively recently to subject servicemembers to court-martial for capital "civilian" offenses. Petitioner's portrayal of history is at least subject to significant question, because the regulations that Congress adopted for the navy in 1800, while appearing to limit the death penalty to murders committed outside the United States, also provided that "[a]ll offences commited by persons belonging to the navy while on shore, shall be punished in the same manner as if they had been committed at sea." Act of Apr. 23, 1800, ch. 33, § 1,

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[18] See also *Martin* v. *Mott*, 25 U.S. (12 Wheat.) at 37-38 ("The act of 1795 is not confined in its operation to cases * * * in times of public war. * * * It is sufficient for us to say, that there is no such limitation in the act itself"); 15 Annals of Cong. 326 (1806) (death penalty provision should remain because "in peace [we have] found no ill consequence arising therefrom").

Art. XVII, 2 Stat. 47. As this Court noted in *Solorio*, "[a]mong the offenses punishable if committed at sea were murder, embezzlement, and theft," and "[t]his broad grant of jurisdiction to naval courts-martial would suggest that limitations on the power of other military tribunals during this period were the result of legislative choice rather than want of constitutional power." 483 U.S. at 445 n.11. In any event, even if Congress did not authorize early courts-martial to impose capital punishment for a broader range of offenses, that would be extremely weak evidence of a lack of power to do so. See *O'Callahan* v. *Parker*, 395 U.S. 258, 280 n.6 (1969) (Harlan, J., dissenting) ("On such a theory, for example, Congress could not have permissibly waited, as it did, until 1875 to confer federal-question jurisdiction on the district courts; the present-day exercise of this jurisdiction would be unconstitutional") (citations omitted).

Petitioner's argument also overlooks the fact that the early Congresses were creating a system of justice for a force that in 1789 numbered only a few hundred soldiers, and which remained under 3,700 strong when the Bill of Rights was adopted. See Wiener I, *supra*, 72 Harv. L. Rev. at 8-9; *O'Callahan*, 395 U.S. at 280 (Harlan, J., dissenting). Murders of civilians by members of such a small force would not have been a major problem, and could conveniently be dealt with by requiring commanding officers, on pain of being cashiered, to deliver the offender to state authorities. See Wiener I, *supra*, 72 Harv. L. Rev. at 10-11; see also *Caldwell* v. *Parker*, 252 U.S. 376, 381-383 (1920) (discussing evolution of requirement). Without again lapsing into anachronism, petitioner cannot seriously suggest that Congress's choice of that solution reflected any special concern for limiting the soldier's punishment, or preserving to him the benefit of any specific provision of the Bill of Rights. Not only was the death penalty routinely inflicted by the civil courts of the time, but also the Bill of Rights was not made applicable



to the States until after the Fourteenth Amendment was adopted nearly one hundred years later.

Petitioner can derive no greater support from case law than from history, because the cases on which he relies (Br. 9-10) do not bear on the President's authority to regulate court-martial proceedings involving members of the armed forces. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the question was whether, as Commander-in-Chief, the President could seize private property, when Congress had impliedly *prohibited* that action in the Taft-Hartley Act. See *id.* at 602 (Frankfurter, J., concurring); *id.* at 634, 639 (Jackson, J., concurring); *id.* at 655, 660 (Burton, J., concurring); *id.* at 660, 662 (Clark, J., concurring in the judgment). Similarly, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866), involved the authority of the President to direct the trial of a *civilian* by a military commission in a jurisdiction where the courts remained open. And *Reid* v. *Covert*, 354 U.S. 1 (1957), also involved the authority of courts-martial to try *civilians* for criminal offenses. *Id.* at 33 (plurality opinion) (noting "the deeply rooted and ancient opposition in this country to the extension of military control over civilians," and citing, *inter alia*, *Milligan*, *supra*). *Reid* recognized that, with respect to members of the armed forces, "Congress has given the President broad discretion to provide the rules governing military trials." *Id.* at 38 (plurality opinion) (citing Art. 36, UCMJ, now codified at 10 U.S.C. 836). Thus, "[i]n each of [those] cases * * * [t]he constitutional question presented turned on the status of the persons as to whom the military asserted its power." *Schlesinger* v. *Councilman*, 420 U.S. 738, 759 (1975). For that reason, those cases are inapposite here.

4. Petitioner is also wrong to contend that the Eighth Amendment independently requires that a legislature, as opposed to any other organ of government, prescribe aggravating factors in cases where the death penalty is otherwise authorized by statute. That suggestion, which

would transform the Eighth Amendment into a separation-of-powers rule applicable to the States, finds no support in this Court's cases. Cf. *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902) (due process does not require separation of state powers).

Petitioner observes (Br. 19-20; see also ACLU Br. 3-4) that this Court's cases addressing the adequacy of state capital sentencing schemes have, on several occasions, referred to "legislative criteria" limiting the death penalty for certain crimes. See *Zant* v. *Stephens*, 462 U.S. 862, 877 n.15 (1983) (citing *Gregg* v. *Georgia*, 428 U.S. 153, 175, 184 (1976) (plurality opinion)). Those decisions, however, merely reflect this Court's ordinary practice of affording some deference to judgments that legislatures in fact have made. See, *e.g.*, *Gregg*, 428 U.S. at 184; see *id.* at 175 & n.20. They cannot fairly be read to stand for the proposition that the Eighth Amendment *requires* that legislatures make such judgments. Indeed, this Court has repeatedly recognized that aggravating factors may be "legislative or court-imposed." *Zant*, 462 U.S. at 880; see also *Proffitt* v. *Florida*, 428 U.S. 242, 255-256 (1976) (plurality opinion) (state courts can narrow vague statutory factor so as to "provide[] []adequate guidance to those charged with the duty of recommending or imposing sentences in capital cases").[19] This Court's cases therefore provide a complete answer to petitioner's novel attempt to transform the Eighth Amendment

[19] See, *e.g.*, *Arave* v. *Creech*, 113 S. Ct. 1534, 1541 (1993) (noting that state supreme court had adopted a limiting construction and "we believe that construction meets constitutional requirements"); *Walton* v. *Arizona*, 497 U.S. 639, 654 (1990) ("[T]he Arizona Supreme Court has sought to give substance to the operative terms ['especially heinous, cruel or depraved'], and we find that its construction meets constitutional requirements"); *Maynard* v. *Cartwright*, 486 U.S. 356, 360 (1988) (noting that state court could have adopted narrowing requirement to validate otherwise vague aggravating circumstance but failed to do so); *Jurek* v. *Texas*, 428 U.S. 262, 272 (1976) (plurality opinion) (same); *Godfrey* v. *Georgia*, 446 U.S. 420, 428-429 (1980) (plurality opinion).



into a rule for the allocation of authority among branches of the state and federal governments.

5. Petitioner suggests that a different result should obtain here because vesting in the President the authority to specify aggravating factors in military capital cases unconstitutionally unites the power to legislate, prosecute, and sentence in officials of one Branch. Pet. Br. 48-49; see also Public Citizen Br. 28-29; Navy Br. 17-19. As we have explained, however, it is Congress that has legislated, by making murder a criminal offense, authorizing the death penalty for it, and entrusting the implementation of military punishments to the President. In any event, petitioner's assertion, by itself, adds nothing to his claim that Congress may not assign the authority at issue here to the Executive at all, because, if petitioner is wrong on that claim, this Court's cases make clear that the separation-of-powers doctrine does not speak "to the manner in which authority is parceled out within a single Branch." *Touby* v. *United States*, 500 U.S. 160, 167-168 (1991) (rejecting claim that Congress could not assign the power to outlaw certain drugs to the Attorney General, rather than the Secretary of Health and Human Services, "because [the Attorney General] wields the power to prosecute crimes").

Moreover, precisely because the military justice system is at issue, those arguments have little force here. As this Court has frequently noted, "[t]he military is a specialized society separate from civilian society with laws and traditions of its own [developed] during its long history[,] * * * [and whose] primary business * * * [is] to fight or be ready to fight wars should the occasion arise." *Councilman*, 420 U.S. at 757 (internal quotation marks omitted); see *Goldman* v. *Weinberger*, 475 U.S. 503, 506-507 (1986); *Parker* v. *Levy*, 417 U.S. 733, 743 (1974); *Quarles*, 350 U.S. at 17; *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953); accord *In re Grimley*, 137 U.S. 147, 151 (1890). Because of the military's unique role in our society, its system of justice has always to some extent

reflected the sharing of functions that petitioner decries. See, *e.g.*, *Runkle* v. *United States*, 122 U.S. 543, 557 (1887) (President's approval of court-martial sentence "is judicial in its character"); see generally Clinton Rossiter, *The Supreme Court and the Commander in Chief* 102-103 (1976) ("The President is the fountainhead of military justice"). That is a reflection of the fact that military justice and punishment are aspects of military discipline, which always has been understood to flow from the President's role as Commander-in-Chief. See *Swaim* v. *United States*, 28 Ct. Cl. at 221-222. To read into the Constitution at this late date a requirement that those powers be fully distributed among different branches of government, "[o]ne must ignore history, tradition, and practice for [more than] two centuries." *Middendorf* v. *Henry*, 425 U.S. 25, 50 (1976) (Powell, J., concurring); see also *Weiss* v. *United States*, 114 S. Ct. 752, 761-762 (1994).

More fundamentally, courts-martial are Article I courts, see *Weiss*, 114 S. Ct. at 760 (holding that the Constitution does not require that military judges have a fixed term of office); *Parisi* v. *Davidson*, 405 U.S. 34, 41 & n.7 (1972); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858), and for that reason they not only are subordinate to the President's role as Commander-in-Chief but are also subject to controls prescribed by Congress. In the UCMJ, Congress tempered the historical practice of leaving the infliction of punishment to the Executive by providing significant safeguards for servicemembers. Sentencing decisions in specific cases are not made by the President, but are left to servicemembers who are protected against improper influence or retaliation.[20] See

[20] Moreover, while the President ultimately is responsible for promulgating and amending provisions of the *Manual*, the process by which such amendments are issued is subject to significant internal constraint. Cf. *Mistretta*, 488 U.S. at 303-304. The Secretary of Defense must review the *Manual* annually and recommend appropriate amendments. See Exec. Order No. 12,473 (Apr. 13, 1984), 49 Fed. Reg. 17,152 (1984), as amended by Exec. Order No. 12,484 (July 13, 1984), 49 Fed. Reg. 28,825 (1984). In turn, the Secretary has established the Joint Service Committee on Military Justice, consisting of one representative from the Offices of the Judge Advocates-General of each of the armed forces and the Chief Counsel of the Coast Guard. See DOD Directive No. 5500.17 (Jan. 23, 1985). That Committee reviews the *Manual* each year to ensure that it reflects current military practice and judicial precedent. DOD Directive No. 5500.17, para. (d). Unless expressly exempted by the Secretary, changes proposed by the Committee must be published in the *Federal Register* for notice and comment and at least 75 days allowed for such comment. See 47 Fed. Reg. 3401 (1982); DOD Directive No. 5500.17, para. (e)(3). Following the notice and comment period, the DOD General Counsel must submit the Joint Service Committee's report to both the Office of Management and Budget and the Department of Justice for review and approval before it can be transmitted to the President for final action. See Exec. Order No. 11,030, 27 Fed. Reg. 5847 (1962).



*Weiss*, 114 S. Ct. at 762 (detailing statutory safeguards against improper influence). The President functions only as an additional safeguard, because no sentence of death imposed by a court-martial may be executed unless he subsequently approves it. See Art. 71, UCMJ, 10 U.S.C. 871. In addition, Article 51 provides that panel members must vote by secret written ballot, and Military Rule of Evidence 606(b) permits court-martial members to be questioned on "whether there was unlawful command influence," and that information may be used to impeach the verdict. See Pet. App. 17a-18a. Finally, as this Court noted in *Weiss*, "[t]he entire system * * * is overseen by the Court of Military Appeals, which is composed of civilian judges * * *. That Court has demonstrated its vigilance in checking any attempts to exert improper influence." 114 S. Ct. at 762. Thus, although the authority to promulgate aggravating factors is vested in the President, his "powers are not united with the powers of the [sentencer] in a way that has meaning for separation-of-powers analysis." See *Mistretta*, 488 U.S. at 393.

In sum, contrary to petitioner's contention, no principle of constitutional law heretofore recognized by this Court requires that Congress itself enact aggravating

factors to narrow the class of defendants who may be sentenced to the death penalty that Congress expressly authorized in Article 118 of the UCMJ. From the earliest days of the Republic, Congress not only has authorized courts-martial to impose capital punishment, but has left to their or the President's discretion the circumstances when that punishment should be imposed.

### B. The UCMJ Authorizes Adoption Of RCM 1004 And Provides Constitutionally Adequate Standards For Doing So

Petitioner contends (Br. 16-27; see also ACLU Br. 6-10; Public Citizen Br. 9-21) that even if the Constitution does not always require that Congress prescribe aggravating factors in capital cases, Congress has not in fact authorized the President to do so or, if it has, Congress failed to prescribe constitutionally adequate standards to guide or limit the exercise of the President's judgment. There is no merit to those claims.

1. At the outset, petitioner is wrong to maintain (Br. 21; see ACLU Br. 7; Public Citizen Br. 10, 12; Navy Br. 14) that Articles 18, 36, and 56 of the UCMJ cannot be read to delegate to the President any authority to establish aggravating factors in capital cases, because their enactment substantially predated *Furman*. The question is not whether Congress foresaw this particular applicaiton of those UCMJ articles, but whether RCM 1004 comes within their plain language and general purpose—*i.e.*, to give the President flexibility to limit which punishments may be imposed by courts-martial and authority to ensure that the military justice system, as enacted by Congress, works. It is not the law that a statute can have no effect that was not specifically contemplated by the Congress that enacted it. See *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (Congress may have "had in mind a more obvious" application of the statute "but the language * * * is not so limited; nor can we imagine any reason why Congress would not have wished its language



to cover this situation") (internal brackets omitted); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985); see also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history").

Articles 18 and 56 of the UCMJ could not be plainer in scope, and together they grant the President authority to limit punishments otherwise authorized by the UCMJ. Article 18 states that courts-martial may "adjudge any punishment not forbidden by [the UCMJ]"—specifically "including the penalty of death when specifically authorized by [the UCMJ]"—"under such limitations as the President may prescribe." 10 U.S.C. 818. Article 56 similarly provides that punishment may not "exceed such limits as the President may prescribe for that offense." 10 U.S.C. 856. Article 118 expressly authorizes a court-martial to sentence the defendant to death or life imprisonment in cases of premeditated murder or felony murder. It is therefore plainly within the scope of Articles 18 and 56 for the President to "limit" the availability of the death penalty under Article 118 only to those cases, like petitioner's, that involve some form of aggravated conduct.[21]

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[21] It is difficult to understand petitioner's conclusory assertion that Articles 18 and 56 "are irrelevant to this case," because, "[l]ogically, no 'limit' may be set on a penalty of death." Br. 18. If petitioner means to suggest that such authority may be exercised only on a case-by-case basis, and that the death penalty cannot be limited *in any one case*, his argument overlooks the origins of the President's authority to "limit" punishments. Articles 18 and 56 were meant to standardize punishments across the country, see H.R. Rep. No. 1051, *supra*, at 1, and the President has long exercised that authority with respect to *classes* of cases. See, *e.g.*, *Carter* v. *McClaughry*, 183 U.S. 365, 382 (1902) (discussing 1891 use of authority to limit jail terms for enlisted men, but not for commissioned officers). Indeed, the logical implication of petitioner's argument is that the authority to "limit" has no application

An additional basis for such authority is Article 36(a) of the UCMJ, which provides that the President may prescribe "[p]retrial, trial, and post-trial procedures" in all "cases arising under [the UCMJ] triable in courts-martial." 10 U.S.C. 836(a). Petitioner and his amici maintain (Pet. Br. 18-21; ACLU Br. 8-10; Public Citizen Br. 13-15) that Article 36 cannot support RCM 1004, because aggravating factors in capital cases are not matters of "procedure" but are more properly classified as "substantive." ACLU Br. 9.[22] Apart from the difficulty of reconciling that position with *Dobbert* v. *Florida*, *supra*,[23] Congress has clearly expressed its intention that the phrase "[p]retrial, trial, and post-trial procedures" in Article 36(a) be broadly construed. Indeed, Congress amended Article 36 in 1979 to disapprove statements of the Court of Military Appeals to the effect that Article 36, as it then read, narrowly confined the President's au-

whatever with respect to capital cases, a position that renders superfluous Article 18's express inclusion of capital cases within its scope.

[22] The ACLU argues (ACLU Br. 8, 10-11) that aggravating factors in capital cases are not only matters of substance, they "define" or are "elements of [the] crime" and must therefore be articulated by the legislature. That is wrong. "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Walton*, 497 U.S. at 648 (quoting *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986)); see also *Lewis*, 497 U.S. at 782 (same).

[23] *Dobbert* held that, for purposes of the Ex Post Facto Clause of the Constitution, U.S. Const. Art. I § 9, Cl. 3, a capital sentencing mechanism was "clearly procedural" when it "simply altered the methods employed in determining whether the death penalty was to be imposed" and effected "no change in the quantum of punishment attached to the crime." 432 U.S. at 293-294; accord *Jordan* v. *Watkins*, 681 F.2d 1067, 1079 (5th Cir. 1982); *Irving* v. *State*, 441 So. 2d 846, 852-853 (Miss. 1983), cert. denied, 470 U.S. 1059 (1985); *State* v. *Coleman*, 605 P.2d 1000, 1012-1015 (Mont. 1979), cert. denied, 446 U.S. 970 (1980).



thority to matters relating to the actual conduct of the trial.[24] See S. Rep. No. 197, 96th Cong., 1st Sess. 124-125 (1979). The Committee Report explained that

> [it] believe[d] that [the Court of Military Appeals'] interpretation flies in the face of history; if adopted, it would severely threaten the integrity of the military justice system and undermine the authority of the President as Commander-in-Chief. The committee's amendment clarifies what it believes Congress has always intended by enacting Article 36 and its predecessors. While Congress retains the power to amend the UCMJ to alter the military justice system, it entrusts to the President the promulgation of regulations designed to implement the Code and operate the system.

*Id.* at 123; see also *Reid*, 354 U.S. at 38 (plurality opinion). The Commander-in-Chief's promulgation of aggravating factors, in order to ensure that capital offenses under the UCMJ remained constitutionally viable in the aftermath of *Matthews*, is, without doubt, the type of rule "designed to implement the Code and operate the system" (S. Rep. No. 197, *supra*, at 123) that Congress had in mind when it enacted and amended Article 36.

Since that amendment, Congress has made even clearer its view that Article 36 gives the President authority to

[24] Prior to the 1979 amendment, Article 36 authorized the President to prescribe "[t]he procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals." See Act of May 5, 1950, ch. 169, § 1, Art. 36, 64 Stat. 120. Significantly, the amendment was expressly intended to repudiate a decision on which petitioner relies to support his claim that Article 36 applies only to purely procedural matters. See Br. 18, citing *United States* v. *Ware*, 1 M.J. 282, 285 & n.10 (C.M.A. 1976) (stating, in dicta, that the phrase "cases before courts-martial" restricted the President's rule-making authority to those aspects of the case concerning the actual trial and excluded, by implication, pretrial and post-trial procedures).

promulgate factors that narrow the class of military accused eligible for the death penalty. In 1985, Congress enacted Article 106a of the UCMJ, 10 U.S.C. 906a, which makes it a capital offense for a servicemember to engage in espionage. See Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534, 99 Stat. 634. The new article enumerates three specific aggravating factors and further states that such aggravating factors may also include "[a]ny other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36)." 10 U.S.C. 906a(c)(4). "[T]he fact that Congress in [1985] authorized the [President] to [promulgate aggravating factors under Article 36] strongly suggests that Congress understood" the UCMJ to confer such authority. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2414 (1995); see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) ("recogniz[ing] that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight"). The Conference Report on the legislation that became Article 106a makes the point even more clearly. It states:

> Nothing in the new Article 106a is meant to preclude a prosecution under any other article of the UCMJ * * *.
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> * * * * *
>
> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provisions of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles.



H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 425 (1985).[25] The conferees' endorsement of the use of RCM 1004's procedures in espionage cases, and their statement that nothing in Article 106a would preclude prosecution under other provisions of the UCMJ or affect the "validity" of RCM 1004, can only be read as expressing agreement that RCM 1004 is a lawful exercise of Presidential authority.[26]

There is no merit to petitioner's argument (Br. 11, 21-22, 26-27) that Articles 18, 36, and 56 should be construed "narrowly" to preclude the President from adopting RCM 1004, based on the rule of lenity and in order to avoid doubts as to the constitutionality of those articles. It is anomalous to invoke the rule of lenity to support a challenge to the President's decision to *restrict* the class of defendants who are eligible for the death

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[25] To minimize the significance of the 1985 legislation, petitioner cites (Br. 24-25) *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980), for the proposition that "subsequent legislative history provide[s] an extremely hazardous basis for inferring the meaning of a congressional enactment." But as the *GTE* case also recognized (*ibid.*, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969) (emphasis added)), "[s]ubsequent *legislation* declaring the intent of an earlier statute is entitled to great weight in statutory construction." In this case, both the "subsequent legislation" (Article 106a) and its legislative history express the view that the UCMJ already granted to the President authority to promulgate aggravating factors in capital cases.

[26] Amicus Public Citizen argues (Br. 18-19) that Article 106a evidences Congress's belief that the President lacks authority to promulgate aggravating factors in capital cases, because Article 106a delegates that authority to the President only in espionage cases. The problem with that claim is that Article 106a did not "delegate" that authority to the President; that authority already existed by virtue of Article 36, a provision that is not limited to espionage cases. The point of Article 106a(c)(4) is to ensure that the enumeration of specific factors not be interpreted to oust the President's *pre-existing* authority under Article 36 to promulgate additional factors.

penalty under Article 118, since by conforming sentencing hearings to the dictates of *Furman*, RCM 1004 "provid[es] capital defendants with more, rather than less, judicial protection." *Dobbert*, 432 U.S. at 294-295.

It is no less odd to assert that, to avoid constitutional questions, Articles 18, 36, and 56 must be read to prohibit promulgation of RCM 1004, since that argument is advanced in aid of petitioner's claim that a different provision of the UCMJ—Article 118—is unconstitutional insofar as it authorizes the death penalty for his crimes. Petitioner's invocation of that canon of construction also ignores the fact that the President expressly invoked his constitutional authority under Article II when he promulgated RCM 1004. See Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984). A conclusion that Articles 18, 36, and 56 do not themselves authorize the President's action therefore not only would be inconsistent with the broad language and the purpose of those provisions, but also would require this Court to decide whether the President has the constitutional power to do so under Article II, even in the absence of affirmative statutory authorization. See *Parker*, 417 U.S. at 744-745 (quoting *Martin*, 25 U.S. (12 Wheat.) at 35-36); see also *Reid*, 354 U.S. at 38 & n.70 (plurality opinion).

If petitioner means to argue that the UCMJ should be read to *prohibit* the President from restricting the class of military defendants who may be sentenced to death under Article 118, that argument would raise serious constitutional questions in its own right, for we doubt that Congress could so bluntly impair the President's authority as Commander-in-Chief. As it happens, however, nothing in the text or legislative history of the UCMJ remotely suggests that Congress has prohibited the President from adopting RCM 1004. To the contrary, the 1985 amendments and the "general tenor of Congress' legislation in this area" demonstrate that Congress has accepted and indeed approved of such action by the President. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 678-688



(1981); *id.* at 668-669; *Haig* v. *Agee*, 453 U.S. 280, 291-292, 300-301 (1981).

In any event, both lenity and the avoidance of interpretations that would raise serious constitutional problems are canons that apply at the *end* of the process of construction, and then only in the face of a statutory "ambiguity." *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2283 (1993); *Reno* v. *Koray*, 115 S. Ct. 2021, 2029 (1995). Moreover, a statute is not ambiguous "merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government." *Moskal*, 498 U.S. at 108. Here, with the exception of his strained attempt to read narrowly the word "procedures" in Article 36(a), petitioner has not even attempted to offer a coherent interpretation of Articles 18, 36, and 56 that is faithful to the language of those articles, to Congress's long-standing practice of confiding to the Executive judgments as to punishment (including death) within statutory limits, to Congress's 1985 decision to build on the President's ability to exercise the power that petitioner disputes, and to the need to avoid the significant constitutional questions raised by petitioner's own position. For those reasons, petitioner can derive no help from the canons of construction he invokes.

2. Petitioner and his amici are also wrong to argue (Pet. Br. 27-37; ACLU Br. 13-16; Public Citizen Br. 21-25; Navy Br. 12-15) that Articles 18, 36, and 56 fail to provide the President constitutionally adequate guidance for the exercise of the authority they confer. To begin with, the President's independent constitutional authority as Commander-in-Chief of the armed forces would make appropriate even what petitioner characterizes (Br. 31) as a standardless authorization to regulate military sentences. Compare *Curtiss-Wright Export Corp.*, 299 U.S. at 321-322. The President's functions under the UCMJ, "like the Court's function in promulgating procedural rules, are clearly attendant to a central element of the

historically acknowledged mission of the [Executive] Branch." *Mistretta*, 488 U.S. at 391. Where, as in this case, the President has fulfilled his constitutional functions by issuing rules to ensure that courts-martial impose sentences in capital cases in a manner that assures their constitutionality while protecting the needs of military discipline, Congress has no greater duty to specify factors he must consider than it must specify in granting power to the federal judiciary, as an adjunct of its adjudicatory powers under Article III, to make rules for the purpose of ensuring that cases will be adjudicated properly. See, *e.g.*, *id.* at 387-388; *Hanna* v. *Plumer*, 380 U.S. 460, 471-472 (1965); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1941); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51, 61-62 (1825).[27]

Thus, it is "not necessary that Congress supply [the President] with a specific formula for [his] guidance," *Lichter* v. *United States*, 334 U.S. 742, 785 (1948), when, as here, it is appropriate that the President retain flexibility to adapt the broad outlines of congressional

[27] Moreover, in exercising that power to preclude the imposition of the death penalty except in cases of aggravated murder, and to require a sentence of life imprisonment in the remaining cases, the President made a decision that is similar in kind to those he is called upon to make when he commutes a sentence under his constitutional power "to grant Reprieves and Pardons." Art. II, § 2, Cl. 1. See *Schick* v. *Reed*, 419 U.S. 256 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1856); see also *Biddle* v. *Perovich*, 274 U.S. 480, 487 (1927) (Holmes, J.) (President may order life imprisonment in lieu of death sentence since "[b]y common understanding imprisonment for life is a less[er] penalty than death"). The President is, for that additional reason, uniquely qualified to exercise the sentence-limiting authority granted by Articles 18 and 56 with respect to the death penalty, and, by the same token, it is especially unlikely that Congress would have intended to withhold the power to do so in that setting. In fact, Article 71 of the UCMJ requires that every sentence of death shall be personally approved by the President before it is executed, which ensures an opportunity for commutation. See 10 U.S.C. 871.



policy to changing circumstances in the specialized field of military discipline, over which the Constitution gives Congress and the President shared authority. See *ibid.*; *id.* at 778-779 (Congress's power to confer "authority * * * sufficient to effect its purposes * * * is especially significant in connection with constitutional war powers under which the exercise of broad discretion * * * may be essential"); *Knauff*, 338 U.S. at 543. Nonetheless, history and the background of similar provisions of military law indicate that the nature and scope of the President's discretion were well understood by the political Branches. In light of the long-standing Presidential authority to limit punishments, Congress doubtless expected (see *Grimaud*, 220 U.S. at 518; *United States* v. *Bailey*, 34 U.S. (9 Pet.) 238, 255-256 (1835)) that the authority conferred by Articles 18 and 56 would be exercised by him by reference to the factors that have traditionally informed his judgment—*i.e.*, the needs of military discipline, evenhanded application of court-martial punishments throughout the country, see H.R. Rep. No. 1051, *supra*, at 1, and his own judgment regarding the sorts of factors that would make a statutory sentence unduly harsh as applied to specific circumstances. See *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946) (delegation is constitutionally sufficient "if Congress clearly delineates the general policy * * * and the boundaries of th[e] delegated authority"); see also *Yakus* v. *United States*, 321 U.S. 414, 420, 426-427 (1944) (upholding delegated authority to fix commodity prices that in judgment of Price Administrator "will be generally fair and equitable and will effectuate the purposes of" price control legislation); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (upholding delegation to FCC to promulgate regulations in accordance with its view of the public interest).

In addition, Article 18 contemplates that the President may "prescribe * * * any punishment not forbidden" by the UCMJ. Article 55 of the UCMJ expressly forbids the

imposition of "cruel or unusual" punishments, 10 U.S.C. 855, and the legislative history of the UCMJ shows that Congress had Article 55 specifically in mind when it referred in Article 18 to punishments "forbidden" by the UCMJ. See S. Rep. No. 486, 81st Cong., 1st Sess. 13 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 16 (1949). Accordingly, the President surely must be understood to have the authority under Article 18 to subject sentences to "limitations" necessary to comply with Article 55's prohibition against "cruel or unusual" punishments—a statutory term that he could appropriately interpret by considering, as he did, this Court's decisions construing the parallel language of the Eighth Amendment.

The same result is compelled by the language of Article 36(a), which gives the President still further guidance. Article 36(a) states that the court-martial rules promulgated by the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. 836(a). Petitioner nonetheless argues (Br. 31-32, 34; see Public Citizen Br. 23) that Congress established no "principles of law" on which the President could rely, because when RCM 1004 was first promulgated only the federal air piracy statute contained a list of aggravating factors.[28] By the time RCM 1004 was adopted, however, this Court

[28] See Antihijacking Act of 1974, Pub. L. No. 93-366, Tit. I, § 105, 88 Stat. 412-413, codified at 49 U.S.C. 1473(c)(7) (1976). Contrary to petitioner's argument (Br. 34) that the aggravating factors in that statute bear "almost no similarity" to those later adopted by the President, RCM 1004(c)(4)—which addresses the creation of substantial danger to the lives of persons other than the victim—is virtually identical to Section 1473(c)(7)(B)(iii) of the air piracy statute. Similarly, although petitioner maintains (Br. 34) that the aggravating factors contained in Article 106a could not have been relied upon by the President, the Rule was amended in 1986 to reflect those factors. See *Manual* App. 21-73, citing Art. 106a.



had developed a substantial body of case law addressing the adequacy of state capital sentencing schemes. Because those cases set forth Eighth Amendment principles applicable to any capital sentencing scheme enacted by Congress, those cases plainly reflect "principles of law" that must be "recognized" in "the trial of criminal cases in the United States district courts." See, *e.g.*, *United States* v. *Flores*, 63 F.3d 1342, 1369-1373 (5th Cir. 1995). This Court's cases therefore afforded a firm basis upon which the President could rely in formulating constitutionally sufficient aggravating factors.[29]

This Court's decisions are not the only source on which the President could rely in ascertaining appropriate standards pursuant to Article 36. In defining both military and civilian capital offenses, Congress had identified, even before *Furman*, factors that it considered sufficiently egregious to merit the death penalty. See *Stanford* v. *Kentucky*, 492 U.S. 361, 372 n.4 (1989) (collecting laws). The President relied heavily on those congressional judgments. See *Manual* App. 21-69 to 21-74. For example, aggravating factors (c)(2) and (c)(3), which involve the creation of "substantial damage to the national se-

[29] *Gregg* v. *Georgia*, 428 U.S. 153, 193 n.44 (1976) (lead opinion), approved the sentencing standards found in the Model Penal Code, and also upheld the Georgia capital sentencing scheme, which generally follows the Model Penal Code, *id.* at 164-166 & n.9, 196-198 (lead opinion); *McCleskey* v. *Kemp*, 481 U.S. 279, 302 & n.24 (1987); see also *Proffitt* v. *Florida*, 428 U.S. 242, 248 n.6 (1976) (lead opinion). The aggravating factors in Rule 1004 have close analogues in the Model Penal Code and the Georgia and Florida statutes. The drafters of RCM 1004 also relied on other aspects of this Court's Eighth Amendment case law. For example, aggravating factors (c)(8), which limits the circumstances under which the death penalty can be imposed for murder under the felony-murder doctrine, and (c)(9), which specifies the circumstances under which the death penalty can be imposed for the offense of rape, were formulated to conform military capital sentencing practice to this Court's decisions in *Tison* v. *Arizona*, 481 U.S. 137 (1987), and *Coker* v. *Georgia*, 433 U.S. 584 (1977). See *Manual* App. 21-73.

curity of the United States," are based on the fact that, in both the civilian and military contexts, Congress has specifically recognized that such damage may warrant imposition of the death penalty. See *Manual* App. 21-72. Likewise, in enacting 18 U.S.C. 1111 and Article 118(4) of the UCMJ, 10 U.S.C. 918(4), Congress expressly authorized the death penalty for homicides committed during the perpetration of certain violent felonies, including robbery. Aggravating factor (c)(7)(B), which focuses upon the commission of a murder during the commission or attempted commission of such felonies, and aggravating factor (c)(7)(C), which involves the commission of a murder "for the purpose of receiving money or a thing of value," both reflect that congressional determination.[30] Thus, as the *Curtis* court concluded (J.A. 122), in formulating aggravating factors, "the President was not set adrift in an uncharted sea * * * [but] was guided by the Uniform Code and other federal legislation." Indeed, when Congress enacted a new Federal Death Penalty Act in 1994, Pub. L. No. 103-322, Tit. VI, § 60002, 108 Stat. 1959 (codified at 18 U.S.C. 3591-3598), many of the aggravating factors it adopted for capital homicide offenses were virtually identical to those earlier identified by the President in subsection (c)(7) of RCM 1004. See,

[30] Similarly, aggravating factors (c)(7)(F) and (c)(7)(G), which focus upon the victim's status as a senior government official, military superior, law enforcement officer, or public servant, are based upon the congressional determination that such officials merit special protection and that their murder warrants the death penalty. See *Manual* App. 21-73, citing 18 U.S.C. 351, 1114, 1751. The President recently amended aggravating factor (c)(7)(B) by the addition of the fact that the murder was drug related. The amendment was based upon the enactment of "[c]urrent federal statutes [which] provide for a maximum punishment including the death penalty for certain drug-related killings." *Manual* App. 21-73, citing 21 U.S.C. 848(e).



*e.g.*, 18 U.S..C 3592(c)(1), (3)-(8), (12) and (14).[31] With the actions of the President and Congress so closely aligned, petitioner has given this Court no sound reason to overturn the President's judgment in promulgating RCM 1004.

## CONCLUSION

The judgment of the United States Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted.

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DECEMBER 1995

[31] Significantly, Congress also provided a catch-all provision authorizing the jury to rely on "any other aggravating factor" of which the defendant has received notice from the prosecutor, irrespective of whether the factor is listed in the statute. See 18 U.S.C. 3592(c). That provision further undermines petitioner's contention that the designation of specific aggravating factors is, and that Congress would expect it to be, peculiarly a legislative choice.

## APPENDIX

Article I of the Constitution provides in relevant part:

Section 8. [1] The Congress shall have Power
* * *

* * * * *

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * * *

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II of the Constitution provides in relevant part:

> Section 1. [1] The executive Power shall be vested in a President of the United States of America. * * *
>
> * * * * *
>
> [8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."
>
> Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
>
> * * * * *
>
> Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.



Article 55 of the Uniform Code of Military Justice, 10 U.S.C. 855, provides:

> **Art. 55. Cruel and unusual punishments prohibited**
>
> Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

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No. 94-1966

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING, *PETITIONER*,

*v.*

UNITED STATES OF AMERICA, *RESPONDENT*.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ARMED FORCES*

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IN THE

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OCTOBER TERM, 1995

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No. 94-1966

**DWIGHT J. LOVING,** *Petitioner,*

*v.*

**UNITED STATES OF AMERICA,** *Respondent.*

---

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ARMED FORCES*

---

# REPLY BRIEF FOR THE PETITIONER

---

In its brief [hereinafter Resp. Br.], the government reiterates many of the points made in its brief in opposition to the petition for writ of certiorari. In addition, it advances several new arguments intended to convince this Court that the President was acting within his authority when he promulgated Rule for Courts-Martial [hereinafter R.C.M.] 1004 and created aggravating factors to determine which servicemembers would be eligible for the death penalty.[1] Without repeating arguments made in his opening brief,

---

[1] Petitioner challenges only the constitutionality of R.C.M. 1004(c), which creates aggravating factors.

petitioner must address several of respondent's points because they are either factually or legally incorrect, or because they are irrelevant.

## A. THE DEATH PENALTY PROVISION OF U.C.M.J. ARTICLE 118 MAY NOT BE IMPLEMENTED WITHOUT CONGRESSIONAL ACTION.

The government asserts that the "linchpin" of petitioner's argument is that Uniform Code of Military Justice [hereinafter U.C.M.J.] article 118, 10 U.S.C. § 918, is a "nullity" after *Furman v. Georgia*, 408 U.S. 238 (1972). Resp. Br. 10. The government is incorrect, however, because petitioner's argument is not that Article 118's death-sentence provision is "null," but simply that it cannot be effectuated *in a constitutional manner* unless and until, as the Eighth Amendment requires, *Congress* establishes aggravating factors to guide the sentencer's discretion. *See United States v. Woolard*, 981 F.2d 756, 759, *reh'g denied*, 990 F.2d 819 (5th Cir. 1993); *United States v. Harper*, 729 F.2d 1216, 1225 (9th Cir. 1984).

Many death penalty statutes, both federal and state, were in effect in this country before *Furman*. Those statutes were constitutional when written, but this Court determined that, due to the unfettered discretion these statutes allowed judges and juries to exercise in capital cases, the death penalty was being applied in a racist and arbitrary manner. 408 U.S. at 242 (Douglas, J., concurring). This Court thus held that the death penalty as applied violated the Eighth Amendment. 408 U.S. at 239-40.

The government and its *amici* try in vain to exempt U.C.M.J. article 118 from *Furman*'s reach, but *Furman* requires that the unfettered discretion of sentencing panels in the military, or anywhere, be circumscribed by appropriate standards and the rule of law. The government



first speculates that "Congress could have reasonably concluded that those whom the government trains to kill have a special obligation of restraint that makes their commission of murder more morally culpable." Resp. Br. 11 n. 6. This is sheer speculation, and because raised for the first time in the government's brief, this Court should not consider it. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985).

Likewise, the Criminal Justice Legal Foundation (CJLF) argues that the military should be wholly exempt from *Furman*'s reach because the military is a "separate society" somehow outside the Constitution's full reach. CJLF 17-21. In the first place, neither party presented this issue to the Court and it should therefore be ignored. *Tuttle*, 471 U.S. at 815. Moreover, in *United States v. Matthews*, 16 M.J. 354, 369 (C.M.A. 183), the Court of Appeals for the Armed Forces, the highest military court, saw "no military necessity" for placing the men and women of the military outside the reach of the Eighth Amendment, holding instead that *Furman* and its progeny fully protect them. *Id.* Finally, not only did this Court hold long ago, prior to *Furman*, that the Eighth Amendment applies to the military, *see Trop v. Dulles*, 356 U.S. 86 (1958),[2] even the *Furman* dissenters acknowledged that the Court's decision invalidated the death penalty provisions of the U.C.M.J. *See Furman*, 408 U.S. at 417-18.

These new arguments, ripe with speculation, should be ignored. Not only are they untimely, the suggestion that

[2]The government relies on the Fifth Amendment exemption of the military from the grand jury requirement to assert that the Framers had no "special concern with shielding soldiers from the punishment of death." Resp. Br. 26-27. Significantly, however, the Fifth Amendment provision the government quotes clearly shows that while contemplating the special needs of the military, the Framers did not exempt the military from the Fifth Amendment Due Process Clause or the Eighth Amendment. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution").

the military is a "special society" to which "special rules" apply is utterly inept in this context. Petitioner's offenses have analogues in the civilian system and have no special significance in terms of military discipline or national security. None. If anything, an accused in the military needs more protection due to the problem of command influence inherent in the military system. Pet. Br. 15. Moreover, the CJLF argument that the military is immune from the same problems recognized in *Furman*—racism and arbitrariness—is wishful thinking at best; and pernicious at worst.

Prior to *Furman,* "black soldiers routinely were hanged while whites were spared." Richard Serrano, *A Grim Life on Military Death Row,* L.A. Times, July 12, 1994, at A1. It is no coincidence that seven out of eight men currently on death row in the military are minorities and there is a white victim in every case. Dwight Sullivan, *Military Death Row: Separate, Not Equal,* Nat'l. L.J., November 6, 1995, at A19. Finally, recent events at Fort Bragg attest, ugly racist hate groups exist in the military just as they exist at large. William Branigan & Dana Priest, *3 White Soldiers Held in Slaying of Black Couple; Ft. Bragg Suspect's Supremacist Views Were Well-Known, N.C. Officials Say,* Wash. Post, December 9, 1995, at A1; Serge Kovaleski, *Soldiers in White Supremacist Uniforms; 2 Murder Suspects From Fort Bragg Were Part of Fringe Culture,* Wash. Post, December 11, 1995, at A1. Petitioner is clearly entitled to the protections of the Eighth Amendment, including *Furman* and its progeny.

### B. CONGRESS MUST ESTABLISH THE AGGRAVATING FACTORS IN CAPITAL CASES.

The government says that nothing in this Court's jurisprudence requires that legislatures—representatives of the people—establish aggravating circumstances. Indeed,



the government claims that, according to this Court, aggravating circumstances may be "legislative or court-imposed."[3] Resp. Br. 30 (quoting *Zant v. Stephens,* 462 U.S. 862, 880 (1983)). In *Zant,* this Court specifically stated that "statutory aggravating circumstances play a constitutionally necessary function at the stage of *legislative definition:* they circumscribe the class of persons eligible for the death penalty." 462 U.S. at 878 (emphasis added). The government quotation is misleadingly taken out of context. The quotation does *not* refer to the creation of aggravating factors. Instead, the Court merely observed that "the absence of *legislative or court-imposed* standards to govern the jury in *weighing the significance* of ... [the] aggravating circumstances does not render the Georgia capital sentencing statute invalid." 462 U.S. at 880 (emphasis added).

Moreover, the government attempts to gain shelter in opinions of this Court allowing state courts to narrow vague or overbroad statutory aggravating circumstances. *See, e.g., Proffitt v. Florida,* 428 U.S. 242 (1976). Resp. Br. 30 & n.19. These cases are irrelevant, however, because this Court has *never* indicated that any court may create the aggravating factors that make a defendant "death eligible." This Court has simply allowed state appellate courts to impose narrowing constructions on otherwise vague aggravators. The aggravating circumstances themselves, however, were enacted not by the courts, but by *state legislatures* expressing the people's will.

In the military context only Congress can say what aggravating circumstances should make a serviceman death-eligible, but it has not done so. The cases the

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[3]The government argues now that no legislative action is required to create aggravating circumstances. For many years, however, the Department of Justice conceded that legislative action *was required. See, e.g., United States v. Harper,* 729 F.2d 1216 (9th Cir. 1984).

government cites simply have no bearing on this case. As set forth fully in petitioner's opening brief, Congress and Congress alone must make the necessary policy choices. Pet. Br. 37-48.

### C. THE PRESIDENT HAS NO INHERENT AUTHORITY TO ESTABLISH AGGRAVATING FACTORS.

The government attempts to circumvent the need for an explicit delegation of authority. *See* Pet. Br. 11-12. It asserts that the "Commander-in-Chief's constitutional authority easily encompasses," Resp. Br. 16, the authority to create aggravating factors in capital cases and, therefore, the ordinary constitutional limitations on the power of Congress to confer law-making authority on the Executive Branch are less stringent. Resp. Br. 14-19. The government is wrong. The President has no inherent authority to establish punishments. In fact, this Court unambiguously declared in *Solorio v. United States*, 483 U.S. 435, 446 (1987), that "Congress, and not the Executive, was given authority to make rules for the regulation of the Armed Forces." *Solorio* specifically refutes the government's argument that the President has inherent powers in the courts-martial context. *See also Schick v. Reed*, 419 U.S. 256, 267 (1974) ("Of course, the President may not aggravate punishment"). Moreover, the Constitution itself specifically reserves to Congress the power "to make rules for the government and regulation of the land and naval forces." U.S. Const. Art. I, § 8, cl. 14.

This Court's opinions in *United States v. Mazurie*, 419 U.S. 544 (1975); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926); and *Cargo of the Brig Aurora v. United States*, 11



U.S. 382 (1813), all of which the government cites, Resp. Br. 14, do not support its assertion that the President has any inherent authority in this area. In *Mazurie*, this Court held that Congress may delegate authority to regulate alcoholic beverages in Indian territory to tribal authorities. In *Knauff*, although recognizing that the executive has inherent authority in the arena of foreign affairs to exclude aliens, the Court upheld the executive's action based on a *specific* delegation of authority from Congress. Likewise, in *Chemical Foundation*, this Court upheld the Executive Department's sale of patents, copyrights, and trade-marks seized from German citizens based on a *specific* delegation of authority.

The most illuminating case the government relies upon is *Curtiss-Wright*, 299 U.S. 304, in which the Court held there was no violation of the doctrine of separation of powers when Congress delegated authority to the President to determine whether an embargo on the sale of arms and munitions to belligerents in the Chaco war was necessary. In deciding the issue, this Court recognized not only that there was a specific delegation of authority, but also that in the arena of foreign affairs the President's inherent authority is at its pinnacle. *Curtiss-Wright*, 299 U.S. at 315-16. Thus it is clear that none of these cases are relevant to the *internal* domestic affair of governing the armed forces within the geographical limits of the United States during peacetime.

This Court has recognized that the President does have some limited inherent authority as Commander-in-Chief. *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518 (1988); *Ex Parte Quirin*, 317 U.S. 1, 10 (1942); *Swaim v. United States*, 165 U.S. 553 (1897). However, this Court has never recognized any inherent authority to establish criminal offenses, procedures for courts-martial, or criminal penalties. Indeed, this Court specifically recognized long ago that "it has not yet been definitely established to

what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war." *Reid v. Covert*, 354 U.S. 1, 38 (1957).[4]

Moreover, as is apparent from *Kent v. Dulles*, 357 U.S. 116 (1958), no alleged inherent authority as Commander-in-Chief alters the requirement for an explicit delegation. In *Kent*, this Court held that the President's inherent authority in foreign relations and national security does not override individual rights, despite the fact that this Court has repeatedly recognized that the President's powers are greatest in the area of foreign relations. *See Knauff*, 338 U.S at 542; *Curtiss-Wright*, 299 U.S. at 320. It is apparent, therefore, that if the President's broad inherent authority in foreign affairs is insufficient to permit less stringent review when an individual's personal rights have been infringed, then his limited authority as Commander-in-chief does not justify less stringent review under these circumstances.[5]

## D. THERE IS NO EXPLICIT DELEGATION OF AUTHORITY.

The government asserts that U.C.M.J. articles 18, 36, and 56, 10 U.S.C. §§ 818, 836, and 856, "plainly authorize the President to provide that fewer than all of the defendants whom Congress has made eligible for the military death penalty may actually suffer that punishment." Resp. Br. 13. In making this assertion, the government ignores the plain language and intent of those

[4]Significantly, *Reid* was decided after every single case which the government relies on to assert that the President has inherent authority in this context. Resp. Br. 16-19.

[5]Again, while U.C.M.J. article 118 authorizes death as a punishment, *Furman* rendered the death sentence provision invalid unless and until Congress takes additional action to specify aggravating circumstances.



provisions. In addition, the government rebukes petitioner because he does "not even attempt to offer a coherent interpretation of Articles 18, 36, and 56 that is faithful to the language of those articles." Resp. Br. 41.

The government's response begs the primary question. Either there is an explicit delegation with an intelligible principle for the President to follow or there is not. If there is an explicit delegation, there is no need—and no requirement—that petitioner offer an interpretation to explain the delegation. On the other hand, if there is no explicit delegation, which there is not, no interpretation is needed because any delegation under these circumstances *must be explicit. See Greene v. McElroy*, 360 U.S. 471, 507 (1959); *Kent*, 357 U.S. at 129; Pet. Br. 7-13.

In any event, petitioner does "offer a coherent interpretation." Resp. Br. 41. Article 18 is in Subchapter IV (titled "Court-Martial Jurisdiction") and merely establishes the jurisdiction of a general courts-martial. Article 36 is in Subchapter VII (titled "Trial Procedure") and merely allows the President to establish procedures for courts-martial. Article 56 (captioned "Maximum limits"), while in Subchapter VIII (titled "Sentences") merely allows the President to set maximum punishments for offenses when Congress has not addressed the maximum punishment in the punitive articles of the U.C.M.J.

The government asserts that the combination of Articles 18 and 56 allow the President to "limit" the death penalty as authorized by Congress in U.C.M.J. article 118 or any of the articles in which death is an authorized punishment. Resp. Br. 9, 13, 35 n.21. The government also argues that the President was merely "faithfully execut[ing]" the laws Congress has created. Resp. Br. at 17. While these are unique arguments, they fail for a number of reasons.

First and foremost, because the government has never raised these arguments before, they should not be heard now. *Tuttle*, 471 U.S. at 815. In addition, the government

stretches logic and plain language. The government argues that Congress made all persons convicted of U.C.M.J. article 118 eligible for the death penalty. Therefore, in its view, petitioner would have been subject to the death penalty even if the President had not prescribed aggravating factors in R.C.M. 1004. The government thus argues that the President is helping those convicted of murder because he has *excluded* some accuseds from Congress' delimited death-eligible pool. Resp. Br. 39-40. This argument ignores reality and misunderstands and distorts this Court's capital punishment jurisprudence.

First, neither petitioner, nor any other military accused, could constitutionally be sentenced to death for committing an Article 118 offense without any additional finding of aggravating factors. *See Furman v. Georgia,* 408 U.S. 238 (1972); *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983). Thus, the President is not narrowing or "limiting" the class of persons eligible for the death penalty: He is *creating* it. *See Zant v. Stephens,* 462 U.S. at 878 (aggravating factors *define* the class of persons eligible for the death penalty). Likewise, the President is not "faithfully execut[ing] laws: He is creating law. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952) ("The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").

Second, the government's argument that the President was merely acting on Congressional intent to implement the death penalty ignores post-*Furman* political realities. Outside of certain limited death penalty provisions, *see, e.g.,* 49 U.S.C. §§ 1472 & 1473 (aircraft piracy);[6] U.C.M.J. article 106a (espionage by military members); 21

[6] 49 U.S.C. § 1472 was recodified as 49 U.S.C. § 46502 in July 1994. 49 U.S.C. § 1473 was recodified as 49 U.S.C. § 46503 in July 1994 and repealed in September 1994. The aggravating circumstances that now apply to aircraft piracy are found in 18 U.S.C. § 3592, which was enacted in September 1994.



U.S.C. § 848 (continuing criminal enterprise involving drugs and murder), Congress has not been able to reach (prior to the September 1994 enactment of 18 U.S.C. §§ 3591-93) a political consensus to implement the death penalty on a broad scale. Thus, President Reagan, hoping to apply and enforce the death penalty in the military, but unable and without authority from Congress to do so, *created* the post-*Furman* military death penalty. Any doubt about this political reality is dispelled by the fact, which the government does not mention, that bills to enact R.C.M. 1004 were introduced in Congress—not once, but twice—and *failed* to pass. *See* H.R. 3652, 99th Cong., 1st Sess., 131 Cong. Rec. 9462 (1985), introduced October 30, 1985; H.R. 731, 100th Cong., 1st Sess., 133 Cong. Rec. 387 (1987), introduced January 22, 1987.

Moreover, the government's reliance on the word "procedures" in Article 36 as an express delegation is misplaced. The government asserts that this Court's use of the word "procedural" in *Dobbert v. Florida,* 432 U.S. 282, 293 (1977), supports its position. Resp. Br. 36 n.23. The government fails to understand, however, that the word "procedural" means something different when applied in different legal contexts and issues.

> Matters of "substance" and matters of "procedures" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. And the different problems are only distantly related at best ....

*Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 108 (1945) (citations omitted). Thus it is "immaterial" whether

a particular matter is "characterized either as 'substantive' or 'procedural,' " because the law is not concerned with formulating "scientific legal terminology." *Id.* at 109. The issue turns instead on the "intent" and the policy determination behind the law and not on some empty ritualistic adherence to the terminology the courts happen to use in different factual contexts and with respect to very different legal issues. *Id.*

The government simply ignores the facts and the legal issue involved in *Dobbert* and urges the Court to mindlessly rely on "terminological niceties." *Guaranty Trust Co.*, 326 U.S. at 110. In *Dobbert*, this Court was concerned with whether an *ex post facto* violation had occurred when the state applied a capital statute enacted after the offense was committed and which changed the capital sentencing structure in Florida from jury sentencing to judge sentencing. *Dobbert*, 432 U.S. at 287-92. *Dobbert* did not address the nature of aggravating circumstances. The issue before the *Dobbert* Court was simply whether "the change in the role of the judge and jury in the imposition of the death sentence in Florida ... constitutes an ex post facto violation." *Id.* at 292. This Court determined only that *the change from jury sentencing to judge sentencing was procedural for purposes of evaluating an ex post facto claim. Cf. Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958). It did not address the nature of statutory aggravating circumstances in any way.

In the context of creating aggravating factors to determine the class of offenders eligible for the death penalty, the aggravating factors created by the President are not merely "trial procedure[s]" (as defined by U.C.M.J. Subchapter VII) he is authorized to create under Article 36.[7] The aggravating factors define the class of

[7]Indeed, R.C.M. includes a section captioned "Procedures." R.C.M. 1004(b). The President's authority to create these procedures is not challenged in this case. Significantly, however, the aggravating factors are *not* included in "procedures" section but are included instead in R.C.M. 1004(c).



persons on whom the death penalty can be applied.[8] *Zant v. Stephens*, 462 U.S. at 878; *see also Sawyer v. Whitley*, 505 U.S. 333, 344-45 (1992). Thus, the aggravating factors increase the penalty for which petitioner would otherwise have been eligible. Given this fact, aggravating factors cannot be viewed as merely procedural. *Miller v. Florida*, 482 U.S. 423, 433 (1987) ("Although the distinction between substance and procedure might sometimes prove elusive," a provision which increases the penalty for which a defendant will be eligible cannot be "deemed procedural").

### E. THERE IS NO IMPLICIT DELEGATION OR RATIFICATION OF AUTHORITY.

The government asserts that the President's alleged authority to establish aggravating factors in capital cases is "also confirmed by Congress's longstanding practice, from the founding of our Government, of deferring to the President (or his subordinate, the court-martial) on questions of military discipline and punishment, including the circumstances that warrant the penalty of death when authorized by statute." Resp. Br. 19. Following this bold assertion, the government spends a full seven pages of its brief discussing history.

The first problem with the government's historical argument is that it fails to distinguish between capital and non-capital cases and between capital offenses that are uniquely military and capital offenses that have civilian-law parallels. Despite broad powers granted to the President and to courts-martial throughout history, Congress has always jealously guarded the power to authorize death as punishment, and until 1950 it refused to allow a court-martial to sentence an accused to death for the non-

[8]*See* Brief of the American Civil Liberties Union at 8-11 (discussing substantive nature of aggravating factors).

military offenses of murder and rape in peacetime within the geographical limits of the United States.[9] Pet. Br. 13-16. In addition, Congress exhibited, in the U.C.M.J., special concern for capital cases.[10] Thus, it is most improbable that Congress reversed course *sub silentio* and gave the President free reign to decide which servicemembers would be eligible for the death penalty.

The second basic flaw in the government's historical discussion is that it ignores the fact that, even if the government is right that Congress allowed the President and courts-martial such discretion before *Furman*, unguided discretion has been foreclosed by *Furman* and its progeny. Thus, even if it is true that Congress has allowed two hundred years of "unfettered discretion in military capital cases," Resp. Br. 20, that fact is utterly irrelevant to the question this case presents.[11]

Finally, the government's argument is inconsistent with this Court's decision in *Solorio v. United States*, 483 U.S.

[9]The government is incorrect in asserting that petitioner is attempting to "revive the 'service connection' requirement" that was rejected by this Court in *Solorio v. United States*, 483 U.S. 435 (1987). Resp. Br. 27. Petitioner has merely pointed to the historical treatment of non-military capital offenses because Congress' treatment of these offenses clearly dispels any inference that Congress implicitly delegated broad authority to the President to establish aggravating factors in capital cases.

[10]*See, e.g.*, U.C.M.J. article 45, 10 U.S.C. § 845 (no guilty pleas in a capital case); U.C.M.J. article 52, 10 U.S.C. § 852 (unanimous vote on sentence required only in capital cases); U.C.M.J. article 61, 10 U.S.C. § 861 (accused cannot waive or withdraw appeal in capital case).

[11]The government chides petitioner for allegedly being anachronistic, Resp. Br. 26-28, in pointing out Congress' historical preclusion of military jurisdiction in capital offenses which have analogues in civilian law. Contrary to the government's proclamation that "petitioner cannot seriously suggest that Congress' choice of that solution reflected any special concern" of protecting individual rights, Resp. Br. 28, petitioner propounds exactly that premise. *Lee v. Madigan*, 358 U.S. 228, 235 (1959) ("We will attribute to Congress a purpose to guard jealously against the dilution of the liberties" of servicemen); *see also Solorio*, 483 U.S. at 447 ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military").



435 (1987). In *Solorio*, the Court discussed at length the history of courts-martial jurisdiction in the United States, and the Framers' uneasiness with the expansive use of courts-martial. After doing so, the Court stated:

> The unqualified language of [U.S. Const. Art. I, § 8] Clause 14 suggests that whatever these concerns, they were met by vesting in Congress, rather than the Executive, authority to make rules for the government of the military.

483 U.S. at 446.

## F. CONGRESS HAS NOT PROVIDED SUFFICIENT GUIDELINES FOR THE PRESIDENT TO FOLLOW.

The government argues that the President has "independent constitutional authority" even if Congress has left him "standardless." Resp. Br. 41. To begin with, the President has no inherent authority in this arena, *supra*, at 6–8, and, even if he does, Congress still must provide more than a "standardless delegation." *See South Dakota v. United States Department of the Interior*, 69 F.3d 878, 883 (8th Cir. 1995).

Second, the government cites this Court's opinion in *Lichter v. United States*, 334 U.S. 742, 785 (1948), for the proposition that Congress need not provide a "specific formula" to guide the President. Resp. Br. 42. Once again, the government sadly takes language out of context. In *Lichter*, this Court held:

> It is not necessary that Congress supply *administrative officials* with a specific formula for their guidance *in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions* constitute the essence of the program.

334 U.S. at 785. *Lichter* thus provides no assistance to the government since the question here does not involve a technical administrative decision requiring flexibility. Pet. Br. 39-41.

Finally, the government assertion that U.C.M.J. article 18 guides the President's discretion because it allegedly contemplates that the President would refer to U.C.M.J. article 55, 10 U.S.C. § 855, ignores several pertinent facts. First, the government has never relied on Article 18 as establishing guidelines for the President to follow. Second, the government has never relied on Article 55 to guide the President's authority. This argument is thus procedurally barred. *Tuttle*, 471 U.S. at 815. Moreover, even if this argument is properly before the Court, Article 18 does not, as petitioner has previously noted, confer any authority upon the President. It simply establishes the jurisdiction of general courts-martial.

The complete lack of Congressional guidance is even clear from the government's argument that "Congress doubtless expected" the President to be guided by such intangible factors as "the needs of military discipline" and "his own judgment regarding the sorts of factors that would make a statutory sentence unduly harsh as applied to specific circumstances." Resp. Br. 43. If Congress "expected" any such thing, it did not set forth its expectations in any provision of the U.C.M.J. Moreover, the factors the government cites as guidance simply prove petitioner's point that Congress did not guide the President's discretion at all but left the President to use his 'own judgment." Resp. Br. 43. Under these circumstances, it is clear that there is no way to look at any single aggravating factor—or even all of them—and "ascertain whether the will of Congress has been obeyed." *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *see also Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-19 (1989); *Yakus v. United States*, 321 U.S. 414, 425 (1944).



## G. PURSUANT TO ARTICLES I AND II OF THE UNITED STATES CONSTITUTION, CONGRESS MAY NOT DELEGATE TO THE PRESIDENT AUTHORITY TO ESTABLISH AGGRAVATING FACTORS WHICH DETERMINE THE CLASS OF PERSONS ELIGIBLE FOR DEATH.

Both the government and its *amici* apparently suggest that petitioner is arguing the Eighth Amendment includes a separation of powers element. Resp. Br. 29-30, CJLF 11-16. Moreover, the government and its *amici* assert that a ruling in favor of petitioner will transform the Eighth Amendment into a separation of powers rule applicable to the states. Resp. Br. 29-30, CJLF 13.[12]

First and foremost, petitioner *does not* argue that some mysterious separation of powers component latent in the Eighth Amendment prohibits the President from establishing aggravating factors. On the contrary, petitioner simply contends that the President's action violated the separation of powers doctrine as embodied in Articles I and II of the Constitution *and* that to execute petitioner when no constitutionally created aggravating factors exist would violate the Eighth Amendment. Clearly, a decision in petitioner's favor will not create any new rule of law applicable to the states. *Cf. Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

Second, the government is incorrect when it asserts that the "catch-all provision" of 18 U.S.C. § 3592(c), which establishes aggravating factors to be applied in federal death penalty cases, "undermines petitioner's contention that the designation of specific aggravating factors is, and

[12] Even assuming that such an argument had been made, it would not have the far-reaching impact urged by the government and its amici. Indeed, it would have no impact because no state in this country with capital punishment as a permissible punishment has allowed the governor to create aggravating circumstances.

that Congress would expect it to be, peculiarly a legislative choice.'' Resp. Br. 47 n.31. Section 3592(c) allows the sentencer in murder cases, *after finding the existence of at least one aggravating factor enumerated by Congress,* to consider ''any other aggravating factor'' for which the prosecutor has given notice. The government ignores the fact that a finding of ''any other factor,'' without a finding of one of the factors specifically listed by Congress, does not make a defendant death-eligible. 18 U.S.C. §§ 3592(d) & 3593(e).

When the entire statutory scheme—as opposed to one small section taken out of context by the government—is considered, it is clear that through the factors enumerated in Section 3592, Congress determined which defendants convicted of murder would be eligible for the death penalty. Therefore, the aggravating circumstances Congress enumerated in Section 3592 are the factors which *determine death eligibility* within the broad class of persons convicted of murder. *See United States v. Davis,* ___ F.Supp. ___, 1995 WL 628013 (E.D. La. October 28, 1995). In the civilian federal death penalty context, therefore, Congress has not abdicated its responsibility to determine death eligibility.

The ''catch-all provision'' is simply analogous to an evidentiary rule that allows the government to present evidence of ''non-statutory'' aggravating circumstances that the judge or jury may consider after it has determined (by a finding of an enumerated factor) that the defendant is death-eligible. *See Zant v. Stephens,* 462 U.S. at 878. In stark contrast to the ''catch-all provision'' of 18 U.S.C. § 3592(c), the aggravating factors in R.C.M. 1004(c) are not simply evidentiary rules that allow the panel to consider non-statutory aggravating circumstances *after making the guided determination that the accused is within the narrowed class of persons eligible for the death penalty.* On the contrary, the aggravating factors in R.C.M.



1004(c) are used to *determine who among those convicted under U.C.M.J. article 118(1) and (4) will be eligible for the death penalty.* In short, there is simply no analogy to be drawn between R.C.M. 1004(c) and 18 U.S.C. § 3592-(c).

## H. THE NATURE OF THE AGGRAVATING FACTORS SELECTED BY THE PRESIDENT IS IRRELEVANT TO THE DETERMINATION OF WHETHER THERE IS A CONSTITUTIONAL VIOLATION IN THIS CASE.

In its concluding paragraph, the government asserts that ''many of the aggravating factors [Congress] adopted for capital homicide offenses [in 18 U.S.C. § 3592] were virtually identical to those earlier identified by the President'' in R.C.M. 1004(c). Resp. Br. 46. Petitioner does not dispute this claim, but, standing alone, it is irrelevant. The government goes further, however, and declares: ''With the actions of the President and Congress so closely aligned, petitioner has given this Court no sound reason to overturn the President's judgment in promulgating RCM 1004.'' Resp. Br. 47.

This assertion fails to grasp the significance of the issues before this Court. Petitioner has not challenged—and this Court did not grant the writ of certiorari to review—the nature of the aggravating factors in R.C.M. 1004(c). Simply stated, the supposed contemporary ''alignment'' between the President and Congress does not justify and cannot withstand the violation of the separation of powers. The President was—and is—without power to create aggravating factors to define the class of servicemembers eligible for the death penalty.

The President has authority to convene courts-martial, to prosecute cases as capital, to select the members, to select the judge, and to approve the resulting death sentence or

commute it. Pet. Br. 48-49. The government now asks this Court to hold that the President has the inherent authority to create law by defining the class of persons eligible for the death penalty. This "blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *See Reid v. Covert,* 354 U.S. at 39. The government's request must therefore be rejected.

## CONCLUSION

For the foregoing reasons, as well as for all the reasons set forth in petitioner's opening brief, this Court should reverse the judgment of the United States Court of Appeals for the Armed Forces.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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DWIGHT J. LOVING,

*Petitioner*,

*vs.*

UNITED STATES OF AMERICA,

*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## QUESTIONS PRESENTED

1. Is there a separation of powers component to the Eighth Amendment's prohibition of cruel and unusual punishment?

2. Does *Furman* v. *Georgia* apply to the military?

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Clemons v. Mississippi, 494 U. S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990) . . . . . 11

Coker v. Georgia, 433 U. S. 584, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977) . . . . . 19

Dennis v. United States, 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857 (1951) . . . . . 15

Douglas v. Jeannette, 319 U. S. 157, 87 L. Ed. 1324, 63 S. Ct. 877 (1943) . . . . . 14

Eddings v. Oklahoma, 455 U. S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982) . . . . . 9

Flamer v. Delaware, No. 93-9000 (CA3, Oct. 19, 1995) . 12

Foster v. Neilson, 2 Pet. (27 U. S.) 253, 7 L. Ed. 415 (1829) . . . . . 17

Franklin v. Lynaugh, 487 U. S. 164, 101 L. Ed. 2d 155, 108 S. Ct. 2320 (1988) . . . . . 7

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) . . . . . Passim

Godfrey v. Georgia, 446 U. S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980) . . . . . 8

Goldman v. Weinberger, 475 U. S. 503, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986) . . . . . 19

Graham v. Collins, 122 L. Ed. 2d 260, 113 S. Ct. 892 (1993) . . . . . 5, 7, 9





Greer v. Spock, 424 U. S. 828, 47 L. Ed. 2d 505, 96 S. Ct. 1211 (1976) . . . . . 18

Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) . . . . . 6, 15

Harris v. Alabama, 130 L. Ed. 2d 1004, 115 S. Ct. 1031 (1995) . . . . . 10, 16, 20

In re Grimley, 137 U. S. 147, 34 L. Ed. 636, 11 S. Ct. 54 (1890) . . . . . 17

Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976) . . . . . 5

Lewis v. Jeffers, 497 U. S. 764, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990) . . . . . 8

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) . . . . . 7, 9

Lowenfield v. Phelps, 484 U. S. 231, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988) . . . . . 7

Luther v. Borden, 7 How. (48 U. S.) 1, 12 L. Ed. 581 (1849) . . . . . 13

Marks v. United States, 430 U. S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977) . . . . . 6

Maynard v. Cartwright, 486 U. S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988) . . . . . 8, 14

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McGautha v. California, 402 U. S. 183, 28 L. Ed. 2d 711, 91 S. Ct. 1454 (1971) . . . . . 4

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Nixon v. Administrator of General Services, 433 U. S. 425, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977) . . . . . 12

Oregon v. Elstad, 470 U. S. 298, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985) . . . . . 16

Parker v. Levy, 417 U. S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974) . . . . . 17

Patterson v. New York, 432 U. S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977) . . . . . 13

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) . . . . . 16

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Prize Cases, 2 Black (67 U. S.) 635, 17 L. Ed. 459 (1863) . . . . . 17

Proffitt v. Florida, 428 U. S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976) . . . . . 14, 15

Richmond v. Lewis, 121 L. Ed. 2d 411, 113 S. Ct. 528 (1992) . . . . . 11

Schlesinger v. Councilman, 420 U. S. 738, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975) . . . . . 19

Stanford v. Kentucky, 492 U. S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989) . . . . . 16

Stringer v. Black, 503 U. S. 222, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992) . . . . . 12

Taylor v. Louisiana, 419 U. S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975) . . . . . 21

Texas v. White, 7 Wall. (74 U. S.) 700, 19 L. Ed. 227 (1869) . . . . . 13

Thompson v. Oklahoma, 487 U. S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988) . . . . . 16

Tuilaepa v. California, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994) . . . . . 7, 10, 16, 20



United States ex rel. Toth v. Quarles, 350 U. S. 11, 100 L. Ed. 8, 76 S. Ct. 1 (1955) . . . . . 17

United States v. Goodwin, 457 U. S. 368, 73 L. Ed. 2d 74, 102 S. Ct. 2485 (1982) . . . . . 19

United States v. Loving, 34 M. J. 1065 (ACMR 1992) . . . 3

United States v. Loving, 41 M. J. 213 (1994) . . . . . 2, 3

Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) . . . . . 7, 9, 15

Weiss v. United States, 127 L. Ed. 2d 1, 114 S. Ct. 752 (1993) . . . . . 15

Williams v. Calderon, 52 F. 3d 1465 (CA9 1995) . . . . . 12

Williams v. Florida, 399 U. S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970) . . . . . 20

Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) . . . . . 7, 8, 9

Zant v. Stephens, 462 U. S. 862, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983) . . . . . 7, 11

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U. S. Const., Art. I, § 8 . . . . . 16

U. S. Const., Art. I, § 16 . . . . . 16

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U. S. Const., Art. IV, § 4 . . . . . 13

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Uniform Code of Military Justice Art. 23,
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Uniform Code of Military Justice Art. 24,
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Uniform Code of Military Justice Art. 25,
10 U. S. C. § 825 . . . . . 21

Uniform Code of Military Justice Art. 120,
10 U. S. C. § 920 . . . . . 19

**Treatises**

C. Clausewitz, On War (Rapoport ed. 1968) . . . . . 17

W. LaFave & A. Scott, Substantive Criminal Law
(1986) . . . . . 19

F. Maitland & F. Montague, A Sketch of English Legal
History (Colby ed. 1915) . . . . . 8

R. Rotunda & J. Nowak, Treatise on Constitutional Law
(2d ed. 1992) . . . . . 13

D. Schlueter, Military Criminal Justice (3d ed. 1992) . . . 20

**Miscellaneous**

Edward W. Desmond, *Rape of an Innocent, Dishonor in the Ranks*, Time, Oct. 2, 1995 . . . . . 19



Frankfurter & Landis, Power of Congress Over Procedure in
Criminal Contempts in 'Inferior' Federal Courts—
A Study in Separation of Powers, 37 Harv. L. Rev. 1010
(1924) . . . . . 12

Gillers, The Quality of Mercy: The Constitutional Accuracy
at the Selection Stage of Capital Sentencing,
18 U. C. Davis L. Rev. 1037 (1985) . . . . . 12

Hirschhorn, The Separate Community: Military Uniqueness
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62 N. C. L. Rev. 177 (1984) . . . . . 18, 19

The Federalist No. 41 (C. Rossiter ed. 1961)
(J. Madison) . . . . . 18

U. S. Dept. of Justice, Bureau of Justice Statistics,
Sourcebook of Criminal Justice Statistics—1993
(1994) . . . . . 13, 20

J. Wilson, Thinking About Crime 187 (1976) . . . . . 8

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## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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### INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case presents the possibility of expanding *Furman* v. *Georgia*, 408 U. S. 238 (1972) by the creation of a separation of powers component to the Eighth Amendment, or by applying *Furman* and its progeny to the military. *Furman* should not be expanded into either field. Creating a new separation of powers requirement for the death penalty would needlessly complicate an already overcomplicated body of law.

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1. Both parties have consented to the filing of this brief.

Subjecting the military to *Furman* would burden a special society that does not need *Furman*'s protection. The needless expansion of this Court's capital jurisprudence, if accepted, would be contrary to the rights of victims and society which CJLF was formed to advance. CJLF therefore has an interest in the case.

## SUMMARY OF FACTS AND CASE

On December 11, 1988, petitioner Dwight J. Loving, a private in the United States Army, started the crime spree that led to his death sentence. That evening, petitioner robbed at gunpoint two different 7-Eleven stores in Killeen, Texas. The two armed robberies netted him approximately $90.00. *United States* v. *Loving*, 41 M. J. 213, 229 (1994).

Disappointed with this take, petitioner switched from 7-Elevens to taxi drivers. At around 8:00 p.m. on December 12, he called a cab to take him from Killeen to Fort Hood. Petitioner directed the driver to a secluded area of Fort Hood, where he robbed the driver, Private Christopher Fay, at gunpoint. After receiving the money, petitioner shot Private Fay twice in the head, killing him. *Ibid*.

After fleeing to the barracks room and counting his money, petitioner called another cab at around 8:15 p.m. He directed the driver, retired Army Sergeant Bobby Sharbino, to a secluded street in Killeen, where petitioner robbed Sharbino at gunpoint. After forcing Sharbino to lie down on the seat, petitioner shot him in the head and killed him. *Ibid*.

Petitioner tried to kill two more people that night. He pulled a gun on a patron of the nightclub where his girlfriend worked. Fortunately, he dropped the gun, accidentally discharging it. *Ibid*.

Later that night, petitioner and his girlfriend took a cab. After the cab dropped off petitioner's girlfriend, petitioner again directed the driver to a secluded spot, where he tried another armed robbery and execution. The driver successfully resisted this time. *Id*., at 229-230. Petitioner was apprehended the next day, and he subsequently confessed. *Id*., at 230.



A court-martial convicted petitioner on numerous counts, including the premeditated murder of Sharbino and the felony murder of Fay. *Id*., at 231-232. After a sentencing hearing, the court-martial unanimously voted to sentence petitioner "to a dishonorable discharge, total forfeitures, and 'to be put to death.' " *Id*., at 232.

Petitioner's conviction and sentence were affirmed by the Army Court of Military Review, *United States* v. *Loving*, 34 M. J. 1065 (ACMR 1992), and the Court of Appeals for the Armed Forces. *United States* v. *Loving*, 41 M. J. 213 (1994).

## SUMMARY OF ARGUMENT

This Court's death penalty jurisprudence is based on assuring the evenhanded application of capital punishment. This rationale has its basis in *Furman* v. *Georgia*, 408 U. S. 238 (1972) which was motivated by fears of racially biased and arbitrary application of capital punishment due to the excessive discretion given to the sentencer.

The drive for evenhandedness continues to manifest itself in the two main lines of capital cases. The narrowing cases attempt to ensure evenhandedness by limiting the jury's discretion, thus minimizing arbitrariness in capital sentencing. This Court's mitigating cases attempt to achieve this same effect by presenting the sentencer with an accurate sentencing profile. To the extent that there is tension between these two lines of cases, it is best reconciled by going back to the first principle of evenhandedness.

In addition to providing the rationale for *Furman* and its successors, evenhandedness also limits judicial oversight of capital punishment. Judicial review is a drastic measure that is best used sparingly. This is particularly true with respect to capital punishment, which plays an extremely important role in the criminal justice system. Therefore, this Court's capital punishment jurisprudence should only be expanded when such expansion would further promote the evenhanded application of the death penalty.

Creating a separation of powers component of the Eighth Amendment would not advance this core purpose of *Furman*.

This Court's capital jurisprudence is unconcerned with which of the three branches of government regulates capital punishment. It is only concerned with whether a state's procedure minimizes the arbitrary application of the death penalty. Separation of powers is a complex doctrine. Adding it to death penalty procedure would further burden an already overly complicated body of law.

Because the military is a different society with a different criminal justice system, it should not be subject to *Furman* and its progeny. Military society requires a much higher level of discipline than its civilian counterpart. Discipline is necessary both to maintain an effective fighting force and to assure civilian control of the military. Punishment, as an integral part of the criminal justice system, is crucial to maintaining this level of discipline. Because capital punishment is very important to any criminal justice system that employs it, the military should not be burdened by *Furman*.

*Furman* is also unnecessary for the military. One of the greatest sources of potential bias and arbitrariness in capital sentencing is the use of local sentencers and prosecutors. The military system, which is controlled by the nationally elected President, is structurally protected against local bias. Because such arbitrariness is much less likely in a court-martial, *Furman* should not be expanded to include the military.

## ARGUMENT

### I. The purpose of *Furman* and its progeny is to insure the evenhanded application of capital punishment.

*Furman* v. *Georgia*, 408 U. S. 238 (1972) unleashed a legal firestorm. It questioned the validity of a practice, capital punishment, which was firmly established since the beginnings of the Republic. Cf. *McGautha* v. *California*, 402 U. S. 183, 197-198 (1971) (capital punishment was the mandatory penalty for murder when the Bill of Rights was adopted). *Furman* overturned every state capital sentencing scheme then in existence, vacating numerous death sentences. Its progeny have spawned an extremely complicated body of law. See Part II A, *post*, at 11-12.



This Court does not foster such disruption without a reason. *Furman* and its progeny are focused on an important overriding goal: "to promote the evenhanded, rational, and consistent imposition of death sentences under law." *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976).

The present case is best examined from the perspective of *Furman*'s first principle. Petitioner asks this Court to graft a new separation of powers branch onto *Furman*, and then extend this expanded *Furman* to the military. See Brief for Petitioner 19-20. Any decision as complex and potentially disruptive as *Furman* should only be expanded in accordance with its first principles. Therefore, an examination of *Furman*'s purpose is in order.

#### *A. The Problems.*

*Furman* v. *Georgia*, 408 U. S. 238 (1972) was not decided in a vacuum. When *Furman* was decided there were real questions concerning whether the death penalty was being applied in an evenhanded, racially neutral manner. Justice Douglas' opinion in *Furman* noted several sources supporting this contention. See *id.*, at 250-251. The racial concerns behind *Furman* are highlighted by the fact that three of the four original *Furman* petitioners were represented by the NAACP Legal Defense and Education Fund as part of a nationwide campaign to abolish the death penalty. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 278, 113 S. Ct. 892, 905 (1993) (Thomas, J., concurring). "*Furman* v. *Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States, and most particularly in rape cases." *Id.*, at 277, 113 S. Ct., at 904.

This concern shows through in several of the *Furman* opinions. Justice Douglas felt it cruel and unusual to apply capital punishment "selectively to minorities . . . whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." 408 U. S., at 245 (concurring opinion). These sentiments are also found in Justice Marshall's opinion, which noted that "[r]acial or other discriminations in [capital sentencing] should not be surprising . . . ." *Id.* at 365 (concurring opinion). Justice Stewart voiced similar misgivings. "[I]f any basis can be discerned for

the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.*, at 310 (concurring opinion).

Race was not the sole motivation behind *Furman*. "We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black." *Id.*, at 253 (Douglas, J., concurring); accord, *id.*, at 310 (Stewart, J., concurring) ("racial discrimination has not been proved"). The essential *Furman* opinions[2] all focused on what each saw as the arbitrariness of the death penalty as it was then applied. Justice White's concurrence looked to the infrequency of death sentences. A death penalty that is imposed too infrequently cannot advance the deterrence or retribution that was at the heart of capital punishment. See *id.*, at 311-312. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.*, at 313. This arbitrariness was a direct product of the unfettered discretion of capital sentencing juries, and violated the Eighth Amendment. See *id.*, at 314.

The problem of arbitrariness similarly informed Justice Stewart's concurrence. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.*, at 309. Thus, "the petitioners are among a *capriciously* selected random handful upon whom the sentence of death has in fact been imposed." *Id.*, at 309-310 (emphasis added). A penalty "so wantonly and freakishly imposed" violated the Eighth Amendment. *Id.*, at 310.

Justice Douglas summed up the indictment of arbitrariness of the existing system of capital punishment:

> "In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we

2. Being the narrowest positions, the opinions of Justices Douglas, Stewart, and White formed the holding of *Furman*. See *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (lead opinion); see also *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (holding can be found by finding the narrowest ground supported by a majority of the court).



> know that the *discretion* of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Id.*, at 255 (emphasis added).

This is the problem that *Furman* and its successors endeavor to solve.

### *B. The Solutions.*

After *Furman* v. *Georgia*, 408 U. S. 238 (1972) this Court created two lines of authority that try to deal with the problems of capital punishment. One line, drawn directly from *Furman*, requires some narrowing of the class of those who are eligible for the death penalty. See, *e.g.*, *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988). The other line of cases, derived from *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), require that the sentencer be permitted to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality).

There is a real debate as to whether there is a tension between *Furman* and the progeny of *Woodson*'s third prong. See *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring); *Franklin* v. *Lynaugh*, 487 U. S. 164, 182 (1988) (plurality); *Walton* v. *Arizona*, 497 U. S. 639, 664 (1990) (Scalia, J., concurring); *Graham* v. *Collins*, 122 L. Ed. 2d 260, 277, 113 S. Ct. 892, 904 (1993) (Thomas, J., concurring); *id.*, at 293, 113 S. Ct., at 916-917 (Stevens, J., dissenting); *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 760, 114 S. Ct. 2630, 2635 (1994). Since a majority of this Court has not yet overruled one of these lines, they must be reconciled. The best way to reconcile them is in *Furman*'s roots in evenhandedness.

The narrowing line of cases directly promotes the evenhanded application of capital punishment. This is best summarized in one of the handful of cases where this Court found insufficient guidance of a capital sentencer's discretion. "Since *Furman*, our

cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard* v. *Cartwright*, 486 U. S. 356, 362 (1988). Where the sentencer's discretion is not limited by an appropriately narrowed capital sentencing scheme, the risk that improper factors may influence the decision to impose the death penalty are too high. Thus the fact that a murder was found to be "outrageously or wantonly vile, horrible and inhuman" could not constitutionally justify imposing the death penalty because "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429 (1980) (footnote omitted).

By permitting the sentencer "to make a principled distinction between those who deserve the death penalty and those who do not," *Lewis* v. *Jeffers*, 497 U. S. 764, 776 (1990), the narrowing requirement thus enforces evenhanded application of the death penalty by minimizing the chance that the sentencer will impose the death penalty on the basis of improper factors such as race.

The mitigation line is best interpreted in the same context. The notion in *Lockett* and its progeny that the sentencer must be allowed to take into account as mitigating factors defendant's character, record, and the circumstances of the crime is derived from *Woodson*, *supra*, in which this Court struck down a mandatory sentencing scheme. *Woodson* itself was justified in part by a desire to minimize arbitrariness. One justification given by the *Woodson* plurality for striking down mandatory capital punishment was the inevitable widespread nullification by the sentencer of a sweeping, mandatory death penalty for all first-degree murders. See 428 U. S., at 291-296. If the system does not have a formal outlet for appropriate displays of mercy, those who operate the system will find informal ways. This went on for centuries in England, from the faking of reading tests for benefit of clergy, see F. Maitland & F. Montague, A Sketch of English Legal History 72-73 (Colby ed. 1915), to improper insanity verdicts, which dropped sharply upon the abolition of capital punishment, see J. Wilson, Thinking About Crime 187 (1976). Evenhandedness is better served by keeping the



inevitable mercy decision in the open and permitting the state to structure it. See *Woodson*, *supra*, 428 U. S., at 303.

The *Woodson* plurality also justified its result by creating a new constitutional imperative of individualized sentencing. See *id.*, at 303-305. This right, which is reiterated in *Lockett* and its successors, is best viewed through the lens of evenhandedness.

By creating a right to mitigating evidence in order to promote individualized sentencing, the *Woodson-Lockett* line creates at least the risk that the jury will consider improper mitigating factors, or will be given too much discretion and thus make the decision to impose the death penalty upon improper grounds. See *Walton*, *supra*, 497 U. S., at 666-667 (Scalia, J., concurring). The defenders of the *Woodson-Lockett* line invoke evenhandedness to rebut this charge.

The most eloquent defender of the "mitigating" line of cases states that there is no reason "why the requirement that sentencing decisions be based on *relevant* mitigating evidence . . . increases the risk that those decisions will be based on the *irrelevant* factor of race." *Graham*, *supra*, 122 L. Ed. 2d, at 293-294, 113 S. Ct., at 917 (Stevens, J., dissenting) (emphasis in original). By focusing on the admission of *relevant* mitigating evidence, the mitigating line can be seen not as a raw exercise of judicial power to reduce the number of executions, but instead as an effort to promote the accuracy of the sentencer's decision. See *Lockett*, *supra*, 438 U. S., at 602-603 (plurality). By focusing on the individual culpability of each defendant, capital sentencing becomes more reliable. "[T]he rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982). Justice O'Connor sounded a similar note in her concurrence, finding that the purpose of the *Lockett* rule is to "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Id.*, at 118. Or, as Justice Stevens notes, "[w]hen . . . relevant facts are excluded from the sentencing determination, there is more, not less reason to believe that the sentencer will be left to rely on irrational considerations such as racial animus." *Graham*, *supra*, 122 L. Ed. 2d, at 293, 113 S. Ct., at 917 (Stevens, J., dissenting).

Placing the mitigating line of cases on a foundation of evenhandedness helps rationalize this Court's capital jurisprudence. It minimizes the potential tension between the two main lines of cases, and it provides a uniting principle—that the death penalty must be applied evenhandedly to all capital defendants. This Court recognized this when it most recently reconciled the tension between the narrowing and mitigating lines of cases. "There is one principle common to both decisions, however: The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa*, *supra*, 129 L. Ed. 2d, at 760, 114 S. Ct., at 2635.

In addition to providing the rationale for modern capital jurisprudence, the principle of equality also limits the extension of *Furman*. Judicial review must be used sparingly. "The fact that a particular rule may be thought to be the 'better' view does not mean that it is incorporated into the Fourteenth Amendment." *Mu'Min* v. *Virginia*, 500 U. S. 415, 430-431 (1991). Judicial restraint is particularly important with regards to capital punishment. Punishment is the key to any criminal justice system. See *People* v. *Roberts*, 2 Cal. 4th 271, 316, 826 P. 2d 274, 278 (1992). By providing the ultimate punishment for the ultimate crimes, the death penalty plays a particularly important role in those systems that employ it. Thus the federal courts may not invoke the Eighth Amendment to micromanage state death penalty schemes. See *Harris* v. *Alabama*, 130 L. Ed. 2d 1004, 1012-1013, 115 S. Ct. 1031, 1034-1035 (1995). Courts should be careful before invoking the Eighth Amendment to interfere with the death penalty.

One way of limiting the courts' reach over the death penalty is to limit the Eighth Amendment to those rules that serve the core purpose of *Furman*—insuring an evenhanded application of the death penalty. This would prevent the unprecedented expansion of *Furman* that petitioner asks the Court to create in the present case.



## II. The principle of evenhandedness underlying *Furman* is not served by the creation of a separation of powers requirement.

Petitioner asks this Court to do the unprecedented. He wants the Court to add a separation of powers branch to the already complicated capital jurisprudence that has grown from *Furman* v. *Georgia*, 408 U. S. 238 (1972). This extension would not advance *Furman*'s purpose of promoting evenhandedness, would add more complexity to an already overburdened system, and would be contrary to precedent. The Court must nip this branch in the bud before its fruits poison capital sentencing.

### *A. Complexity.*

*Furman* created one of the most complex bodies of law known to this Court. The difficulty in reconciling the potential tensions between this Court's narrowing and mitigating lines of cases, see Part I B, *ante*, at 7, only scratches the surface of the complexity of modern death penalty procedure.

Another example comes from the problems associated with the use of the label "weighing" as applied to capital sentencing schemes. Whether a sentencing scheme is labeled "weighing" or "nonweighing" determines whether *Clemons* v. *Mississippi*, 494 U. S. 738 (1990) or *Zant* v. *Stephens*, 462 U. S. 862 (1983) provides the appropriate standard for determining whether a death sentence was rendered invalid by the consideration of unconstitutional aggravating factors. See *Richmond* v. *Lewis*, 121 L. Ed. 2d 411, 420, 113 S. Ct. 528, 534 (1992). The choice of label is crucial. If a state has a "weighing" system, then the death sentence cannot stand unless there is a separate reweighing by a court without considering the invalid circumstances. *Clemons*, *supra*, 494 U. S., at 744-745. In a "nonweighing" state, however, an invalid circumstance will not overturn a sentence so long as at least one valid aggravating circumstance remains. *Zant*, *supra*, 462 U. S., at 873-874.

While that distinction is crucial to a great many death sentences, this Court has provided little useful guidance to distinguish "weighing" from "nonweighing" systems. See

*Flamer* v. *Delaware*, No. 93-9000 (CA3, Oct. 19, 1995) (Lewis, J., dissenting). Instead, the lower courts must resort to various factors to differentiate "weighing" from "nonweighing" schemes. See *Williams* v. *Calderon*, 52 F. 3d 1465, 1478, n. 13 (CA9 1995). The confusion engendered by this Court's precedents in this area has been noticed by some of its members. See *Stringer* v. *Black*, 117 L. Ed. 2d 367, 383, 112 S. Ct. 1130, 1140 (1992) (Souter, J., dissenting).

This Court has proliferated a blizzard of rules regulating capital punishment procedure. See Gillers, The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing, 18 U. C. Davis L. Rev. 1037, 1039-1040 (1985). This complexity means that "[t]he search for a coherent constitutional sentencing theory will be arduous." *Id.*, at 1039. This complexity has been noticed by those charged with applying *Furman* and its heirs. "[T]he death penalty has become the source of an increasingly vast and enormously complex body of constitutional law, posing issues which often defy clear or even sound resolution." *Flamer*, *supra* (Lewis, J., dissenting).

Grafting a separation of powers branch onto this body of law can only add to its burdensome complexity. Playing referee between the three branches of government is inherently difficult for this Court, sitting at the apex of one of the branches. The difficulty is compounded by the reality of governing. The government simply cannot be divided into three totally separate branches—some overlap is essential. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977). This means that

> "[a]s a principle of statesmanship the practical demands of government preclude its doctrinaire application . . . . In a word, we are dealing with what Sir Henry Maine, following Madison, calls a 'political doctrine,' and not a technical rule of law. Nor has it been treated by the Supreme Court as a technical legal doctrine. From the beginning that Court has refused to draw abstract, analytical lines of separation and has recognized the necessary areas of interaction." Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1012-1014 (1924).



One example of the complexity threatened by petitioner's proposal is the troubling questions of federalism it raises. The death penalty is very rare at the federal level; it is almost solely a state measure. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1993, p. 666 (1994). While recent changes in federal law will lead to relatively more federal death penalties, the death penalty is a component of "preventing and dealing with crime [which] is much more the business of the states than it is of the Federal Government," *Patterson* v. *New York*, 432 U. S. 197, 201 (1977), and will always be primarily a state matter.

Therefore, any separation of powers component of *Furman* logically should be applied to the states.[3] Yet the Constitution reserves the separation of powers for the *federal* government. See U. S. Const., Arts. I-III. States are primarily involved with separating powers under the doctrine of federalism that apportions powers between the states and the federal government. See, *e.g.*, *id.*, Amdt. 10.

The only part of the Constitution concerned with intrastate separation of powers is Article IV, § 4, which empowers the United States to guarantee each state "a Republican form of Government . . . ." Yet this Court consistently holds that this clause is nonjusticiable as "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character." *Luther* v. *Borden*, 7 How. (48 U. S.) 1, 42 (1849); see also *Texas* v. *White*, 7 Wall. (74 U. S.) 700, 729 (1869); *Baker* v. *Carr*, 369 U. S. 186, 218-232 (1962). It is simply alien and disruptive for the federal courts to tell the states how to balance their governments. Petitioner's argument, if accepted, drops this unsettling puzzle into the lap of the federal judiciary.

As the leading modern treatise notes, "[t]he concept of separation of powers is not one that is capable of precise legal definition and it does not yield clear solutions to intragovernmental disputes." 1 R. Rotunda & J. Nowak, Treatise on

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3. The notion that *Furman* already applies a separation of powers component to the states is refuted in the next section of this brief. See Part II B, *post*.

Constitutional Law § 3.12, p. 352 (2d ed. 1992). Adding such concepts to this Court's already complex capital punishment jurisprudence threatens to overwhelm it. "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (1943) (Jackson, J., concurring and dissenting).

*B. Contrary to Furman.*

In addition to being a bad idea, fashioning a separation of powers doctrine from the Eighth Amendment is also bad law. The concept of separate powers does not belong in the Eighth Amendment, *Furman* v. *Georgia*, 408 U. S. 238 (1972), or its successors. Under this Court's precedents, what matters is that procedures that channel discretion and make capital sentencing accurately individual are in place. The branch of government from which these procedures come is irrelevant.

This principle is demonstrated in *Proffitt* v. *Florida*, 428 U. S. 242 (1976). One attack made against Florida's capital sentencing scheme was that two of the statutory aggravating circumstances were unconstitutionally vague. *Id.*, at 255 (joint opinion of Stewart, Powell, and Stevens, JJ.). The lead opinion did not simply look to the statutory language enacted by the Florida legislature, but instead "considered [them] as they have been construed by the Supreme Court of Florida." *Ibid.* As narrowed by the Florida Supreme Court, the challenged provisions passed constitutional muster. *Id.*, at 256.[4]

Any notion that *Furman* contains an Eighth Amendment component is contrary to this result. Of the two challenged circumstances, at least one circumstance, that the killing was " 'especially heinous, atrocious, or cruel,' " *id.*, at 255, was facially unconstitutional. See *Maynard* v. *Cartwright*, 486 U. S. 356, 363-364 (1988). Since this circumstance was saved not by legislative, but by judicial action, at least part of Florida's capital sentencing scheme was judge-made. Yet this fact was irrelevant to the *Proffitt* decision. It did not matter which branch of

4. This part of the lead opinion in *Proffitt* was accepted by a majority of the Court. See *id.*, at 260 (White, J., concurring).



government fixed the aggravating circumstances; what mattered is that the relevant circumstance did its job—"eliminate the arbitrary infliction of death . . . ." *Proffitt*, *supra*, 428 U. S., at 254. This same practice of court-construed aggravating circumstances was upheld by a majority of this Court in *Walton* v. *Arizona*, 497 U. S. 639, 655 (1990).

Petitioner's argument that this Court's capital precedents mandate legislative enactment of death penalty procedures, see Brief for Petitioner 19-20, withers under scrutiny. The joint opinion's dictum in *Gregg* v. *Georgia*, 428 U. S. 153, 175-176 (1976), that only legislatures can determine the death penalty has to be read in context. This statement was part of a warning that courts must limit their judicial review of the decisions of democratic bodies. "But while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators." *Id.*, at 174-175. What mattered was not that Georgia's death penalty law was enacted by the legislature as opposed to the governor.[5] What mattered was that the Court was reviewing the act of an *elected* body. " 'Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.' " *Id.*, at 175 (quoting *Dennis* v. *United States*, 341 U. S. 494, 525 (1951) (Frankfurter, J., concurring)).

The statement quoted by petitioner was part of a policy of deference to the wishes of the people. The President, like the Georgia legislature, is a representative of the people. He is subject to election, see U. S. Const., Amdt. 12, and as the chief executive, sits at the apex of one of the "political Branches." See *Weiss* v. *United States*, 127 L. Ed. 2d 1, 23, 114 S. Ct. 752, 767 (1993) (Souter, J., concurring). "And a heavy burden rests on those who would attack the judgment of the representatives of the people." *Gregg*, *supra*, 428 U. S., at 175. The President, by virtue of his national election, deserves as much respect.

Justice Powell's statement in *Furman* concerning the legislative prerogative in capital punishment was an unsuccessful

5. The governor of Georgia played an indirect role in the promulgation of its sentencing law, having the power to veto any legislation he deemed improper. See Ga. Const. of 1877, art. 5, § 1, ¶ 16.

attempt to restrain unelected, life-tenured federal judges. "Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing *the nine men who sit on this bench* of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics." *Furman* v. *Georgia*, 408 U. S. 238, 418 (1972) (dissenting opinion) (emphasis added). The other cases cited by petitioner, see Brief for Petitioner 20, are similarly unconcerned with limiting executive power. See *Harris* v. *Alabama*, 130 L. Ed. 2d 1004, 1013, 115 S. Ct. 1031, 1035 (1995) (limiting this Court's "power of judicial review"); *Penry* v. *Lynaugh*, 492 U. S. 302, 331 (1989) (legislative judgment is best evidence of how "society views a particular punishment"); *Stanford* v. *Kentucky*, 492 U. S. 361, 370 (1989) (same); *Thompson* v. *Oklahoma*, 487 U. S. 815, 821-822 (1988) (plurality) (same, looking to "the work product of state legislatures and sentencing juries").

These cases stand for nothing more than the proposition that unelected judges should defer to the policy judgments of the people's representatives. The President, as a representative of the people, deserves similar respect. Arguments taken out of context can mislead. See *Oregon* v. *Elstad*, 470 U. S. 298, 304 (1985). This Court should not be misled by Petitioner's out of context arguments.

This Court's modern capital jurisprudence is founded upon one principle. "The State must ensure that the *process* is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 760, 114 S. Ct. 2630, 2635 (1994) (emphasis added). *Furman* should only be extended when it serves this goal. If there is a separation of powers argument to be made[6] it should be made with regard to Articles I and II of the Constitution, not the Eighth Amendment. That is where the separation of powers belongs, and that is where it should stay.

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6. *Amicus* defers to the Solicitor General's arguments regarding the real separation of powers issue under Article I, §§ 1 and 8, and Article II, § 2 of the United States Constitution.



## III. *Furman* does not apply to the military.

*Furman* v. *Georgia*, 408 U. S. 238 (1972) and its progeny have created a complex body of law regulating the death penalty, a practice largely confined to state criminal justice systems. Petitioner now wishes to extend this Court's capital jurisprudence to the vastly different military justice system. The military is a different society possessing a differently structured criminal justice system than the state systems that spawned *Furman*. These differences are enough to raise a serious question of whether *Furman* applies to the military.

### *A. Different Society.*

> "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " *Parker* v. *Levy*, 417 U. S. 733, 743 (1974) (quoting *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 17 (1955)).

Because the military's role is to make or deter war, it must be much more authoritarian than civilian society. "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *In re Grimley*, 137 U. S. 147, 153 (1890); *Levy*, *supra*, 417 U. S., at 744.

The ability to make war is the first requirement of any national government. War is an act of violence by which one sovereign asserts its will against another. See C. Clausewitz, On War 101 (Rapoport ed. 1968). Since it is between sovereigns, it is between entities that do not recognize a common higher authority and command sufficient force to maintain their independence. See *Prize Cases*, 2 Black (67 U. S.) 635, 667 (1863); *Foster* v. *Neilson*, 2 Pet. (27 U. S.) 253, 307-309 (1829). Therefore, states are left to their own internal law to determine how or why they wage war. See Hirschhorn, The

Separate Community: Military Uniqueness and Servicemen's Constitutional Rights, 62 N.C. L. Rev. 177, 208-209 (1984). Because the United States exists in this state of nature, the war powers granted to the political branches are necessarily broad. See The Federalist No. 41, pp. 256-257 (C. Rossiter ed. 1961) (J. Madison). If the United States cannot defend itself, then the Constitution is reduced to a scrap of paper, with no more authority or relevance than Hammurabi's codes.

Discipline is essential to a nation's defense. An undisciplined military is an armed mob, weakening a nation's competence to defend itself so that its policies may be hamstrung, or its existence imperiled. "If one nation maintains constantly a *disciplined* army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprises to take corresponding precautions." *Id.*, at 257 (emphasis added).

Discipline is also necessary to maintain civilian control over the military. Civilian control over a politically neutral military establishment is part of a long American tradition. *Greer* v. *Spock*, 424 U. S. 828, 839 (1976). A lack of discipline is a clear and present danger to civilian control. The President, a civilian, sits at the top of the military hierarchy, see U. S. Const., Art. II, § 2. Any indiscipline at any level of that hierarchy is some threat to civilian control. History is full of examples of breakdowns in discipline subverting civilian control of government. See Hirschhorn, *supra*, 62 N. C. L. Rev., at 215-217. "As long as the Constitution gives the President and Congress the authority to determine the ends for which military force will be used, civilian supremacy requires a system of military discipline that inculcates all ranks with an attitude of active subordination, *i.e.*, the will to carry out the instructions of their civilian superiors despite their own disagreement." *Id.*, at 217.

Individual discipline within an organization is maintained through both direct and indirect controls. Direct discipline simply punishes bad behavior and rewards good behavior. Indirect discipline maintains order by the development of norms to which the individuals in the organization subscribe. This " 'organizational conscience' " allows each individual to



conform his or her actions to the organization's interests without the need for direct supervision. See *id.*, at 219.

The criminal law is essential to both of these methods through deterring improper conduct and by expressing society's outrage at such acts. See *People* v. *Roberts*, 2 Cal. 4th 271, 316, 826 P. 2d 274, 298 (1992). Punishment, "the very purpose of virtually all criminal proceedings," *United States* v. *Goodwin*, 457 U. S. 368, 372 (1982), is integral to the criminal law's competence to deter misconduct and sanctify values. See 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, pp. 33-36 (1986). Any attempt to limit the military's ability to sanction crimes can undermine essential discipline.

Because *Furman* and its progeny limit capital punishment, they would hinder military discipline. Since capital punishment sits at the apex of punishment, it is very important to those systems that employ it. See *ante*, at 10. Therefore, importing *Furman* to the military may pose a real threat to this special society.

This Court's precedents and current events combine to illustrate how *Furman* can hamstring our national defense. Current military law allows for the death penalty to be imposed for a rape committed during hostilities or in a territory under U. S. occupation. See Art. 120, Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 920. This provision appears on its face to violate one of *Furman*'s progeny, at least as it pertains to rapes of adult women. See *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977). Yet, as recent events in Okinawa demonstrate, rape of a civilian by a serviceman abroad can devastate this country's ability to maintain its forces in another country. See Edward W. Desmond, *Rape of an Innocent, Dishonor in the Ranks*, Time, Oct. 2, 1995, pp. 51-52.

" '[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life' in order to prepare for and perform its vital role." *Goldman* v. *Weinberger*, 475 U. S. 503, 507 (1986) (quoting *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975); brackets added by *Goldman* Court; citation omitted). Punishment is too important a part of this discipline for it to be impeded by the heavy hand of *Furman*. The military is simply different, and must be treated differently.

*B. Different System.*

The differences between the military and civilian society are not only social. The very structure of the military justice system mitigates the ills this Court sought to remedy in *Furman* v. *Georgia*, 408 U. S. 238 (1972) and its successors. Since the military has less need for *Furman*, it should be exempt from *Furman*'s burden.

The essence of *Furman* and its successors is "to guard against bias or caprice in the sentencing decision." *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 760, 114 S. Ct. 2630, 2635 (1994). Therefore, these cases seek to control the acts of the capital sentencer, which is usually a sentencing jury, but sometimes is the trial judge. See *Harris* v. *Alabama*, 130 L. Ed. 2d 1004, 1017, 115 S. Ct. 1031, 1038 (1995) (Stevens, J., dissenting).

Both sentencers run the risk of being susceptible to local passion and bias. Juries must be drawn from the locality[7] and are expected to reflect the community's judgments. See *Williams* v. *Florida*, 399 U. S. 78, 100 (1970). Since they are expected to judge the very worst crimes, this problem is potentially greater with capital sentencing juries. This risk is not necessarily lowered by the use of judicial sentencing. Almost all state general jurisdiction court judges are subject to some form of election. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1993, pp. 85-86 (1994). This places trial judges at some risk of being influenced by local passions. See *Harris* v. *Alabama*, 130 L. Ed. 2d 1004, 1020-1021, 115 S. Ct. 1031, 1040-1041 (1995).

The court-martial is not like a judge. It is of limited duration, see D. Schlueter, Military Criminal Justice § 8-1, p. 293 (3d ed. 1992), and has no particular legal competence, see *id.*, § 8-3(A), at 296-298 (describing role of the separate military judge).

Nor is the court-martial like a jury. This is not a body randomly drawn from a list that reflects a fair cross-section of

7. See U. S. Const., Amdt. 6 (right to trial by an impartial jury of the state and district wherein the crime shall have been committed).



the community. See *Taylor* v. *Louisiana*, 419 U. S. 522, 538 (1975). Instead, the convening authority[8] is directed to detail those "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ Art. 25(d)(2), 10 U. S. C. § 825(d)(2). While enlisted personnel have the right to have enlisted members on the jury, they may not come from the accused's unit. UCMJ Art. 25(c)(2), 10 U. S. C. § 825(c)(2).

This body simply does not raise the same risks that juries do. It does not have to be drawn from the locality. It is not randomly selected, but is instead taken from those most likely to be accurate fact-finders and just sentencers. Ultimate control over its selection is not local. Instead, the most cosmopolitan of officials, the President, is responsible for the court-martial. If bias or arbitrariness manifested itself in military capital punishment, the President, by virtue of his national constituency, has the interest to eliminate it, and, as head of the military justice system, has the means to do so. The President's similar control over the prosecution mitigates concerns about the discretion of local prosecutors creating bias. See *McCleskey* v. *Kemp*, 481 U. S. 279, 363-364 (1987) (Blackmun, J., dissenting).

The military is different. Evenhandedness is already preserved by the military's structure, and its special society and needs make *Furman* abnormally burdensome to the military. *Furman* is thus no more than an unnecessary shackle on civilian control of the military.

8. The convening authority is either the President, the Secretaries of the military departments, or certain commanders. See UCMJ Arts. 22-24, 10 U. S. C. § 822-824.

## CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces should be affirmed.

December, 1995

Respectfully submitted,

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No. 94-1966

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING,

*Petitioner*,

—v.—

UNITED STATES OF AMERICA,

*Respondent*.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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11 U.S. (7 Cranch) 32 (1812) . . . . . 3

*United States v. Kennedy*,
618 F.2d 557 (9th Cir. 1980) . . . . . 11

*United States v. Matthews*,
16 M.J. 354 (C.M.A. 1983) . . . . . 1, 6, 7, 11, 15

*United States v. Shepherd*,
576 F.2d 719 (7th Cir. 1978) . . . . . 11

*United States v. Smith*,
13 U.S.C.M.A. 105 (1962) . . . . . 8

*United States v. Watson*,
496 F.2d 112 (4th Cir. 1973) . . . . . 11

*United States v. Wiltberger*,
18 U.S. (5 Wheat.) 76 (1820) . . . . . 3

*Yakus v. United States*,
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18 U.S.C. §§3591-98 . . . . . 12

21 U.S.C. §848 . . . . . 12

21 U.S.C. §848(o) . . . . . 12

49 U.S.C. §1473 . . . . . 12

Omnibus Drug Initiative Act,
Pub.L.No. 100-690,
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**Rules**

Rule for Courts-Martial 1004,
Manual for Courts-Martial, 1984,
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49 Fed.Reg. 17,152 (1984) . . . . . *passim*

**Legislative History**

H.R. 731, 100th Cong., 1st Sess.,
133 Cong.Rec. 387 (1987) . . . . . 12

H.R. 3652, 99th Cong., 1st Sess.,
131 Cong.Rec. 9462 (1985) . . . . . 12

Uniform Code of Military Justice,
Hearings on H.R. 2498 before a
Subcommittee of the House Armed
Services Committee, 81st Cong.,
1st Sess. 565 (1949), *reprinted in*
Index and Legislative History,
Uniform Code of Military Justice (1950) . . . . . 10

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**Other Authorities**

"Military Death Row: Separate, Not Equal," Sullivan, Dwight [Major, U.S.M.C.], National Law Journal, Nov. 6, 1995 . . . . . 12

Story, J., COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th ed. 1873) . . . . . 3, 15

THE FEDERALIST PAPERS, No. 47 324 (J. Madison) (J. Cooke ed. 1961) . . . . . 2



## INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU), is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members, founded in 1920 to defend the Bill of Rights. It has long been active in efforts to enforce constitutional and statutory protections against cruel and unusual punishment, and appeared by invitation before the U.S. Court of Military Appeals in *United States v. Curtis*, 32 M.J. 252 (C.M.A.), *cert. denied*, 502 U.S. 1097 (1991), the holding of which is at issue here.

## STATEMENT OF THE CASE

The accused, an African-American enlisted man on active duty in the United States Army, was convicted of committing murder, off base and in peacetime. He was sentenced to death after the court-martial found the existence of three aggravating factors. The aggravating factors found by the court-martial are set forth in Rule for Courts-Martial (RCM) 1004,[2] which was promulgated by the President after the military death penalty statute passed by Congress was held to be unconstitutional in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). This case tests the power of the executive branch unilaterally to supply the missing aggravating factors in that invalidated statute without further congressional action.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Manual for Courts-Martial, 1984, Exec. Order 12,473, 49 Fed.Reg. 17,152 (1984).

## SUMMARY OF ARGUMENT

At issue in this case is the power to define conduct that permits a court to impose a death sentence. The President's promulgation of Rule 1004, insofar as it defines conduct that can justify the imposition of a death sentence, is an exercise of a legislative function within the province of Congress. Congress has not explicitly delegated its authority to enact a military death penalty, and a delegation cannot be inferred, legally or factually. Even if delegation were inferred, there are insufficient guidelines for executive action.

Although the parties and *amici* have briefed this issue, it bears emphasis that the separation of powers is no mere civics lesson or preference of policy, but a fundamental and enforceable principle of this country's system of government. This Court has time and again reaffirmed the "central judgment of the Framers" that separation of governmental powers is "essential to the preservation of liberty," *Mistretta v. United States*, 488 U.S. 361, 380 (1989), and has "not hesitated to invalidate provisions of law which violate this principle." *Morrison v. Olson*, 487 U.S. 654, 693 (1988). The separation of powers not only resists the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power even to accomplish desirable objectives," *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983), but assures that each branch, representing different constituencies, acts within the proper area of responsibility created for it by the framers. "No political truth is certain of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." THE FEDERALIST PAPERS, No. 47 at 324 (J. Madison)(J. Cooke ed. 1961).

In a system where the branches of government are often at odds, the separation of powers is not a mere theoretical concept, but plays a vital practical role in the politics of governance. It not only protects against tyranny, but provides a balance among the pressures and powers inherent in a republican government.



## ARGUMENT

### I. ESTABLISHING A MILITARY DEATH PENALTY IS A LEGISLATIVE FUNCTION

In the allocation of powers among the three branches, it has been recognized from the earliest days that the definition of behavior that society wishes to punish as a crime is a fundamental legislative function. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or futility these are peculiarly questions of legislative policy." *Gore v. United States*, 357 U.S. 386, 393 (1958)(citations omitted). *See also United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812)(the legislature must define crimes; there are no common law crimes).

The recognition of legislative power over military crimes is of equally long standing. *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857). *See* 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §1197 at 108 (4th ed. 1873)("The whole power is far more safe in the hands of Congress than of the executive"). *Accord Reid v. Covert*, 354 U.S. 1, 68 (1957)(Harlan, J., concurring). In upholding court-martial jurisdiction over off-base crimes with no service connection, this Court recognized Congress's plenary authority under Article I to establish the procedural and substantive law of the armed forces. *Solorio v. United States*, 483 U.S. 435, 441 (1987). Congress has fully exercised this power, providing in Title 10 of the United States Code a detailed Uniform Code of Military Justice governing the substance and procedures of military criminal law.

This Court's Eighth Amendment decisions have consistently emphasized the peculiarly legislative character of defining behavior that is punishable by death. "The constitu-

tional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards." *Gregg v. Georgia*, 428 U.S. 153, 174-76 (1976)(citing *Gore*, 357 U.S. 386, and *Furman v. Georgia*, 408 U.S. 238 (1972)). It is the legislative branch that, in our system, expresses "the will and consequently the moral values of the people." *Furman v. Georgia*, 408 U.S. at 383 (1972)(Burger, C.J. , dissenting). Justice Powell added that the power to define crimes and set punishments "is the very sort of judgment that the legislative branch is competent to make," *id.* at 418. In exercising that responsibility prior to *Furman*, Congress had enacted a military death penalty for no fewer than fourteen separate offenses, including such peculiarly military crimes as improper use of a countersign (Article 101, 10 U.S.C. §901), and misbehavior by a sentinel (Article 113, 10 U.S.C. §913), as well as for murder (Article 118, 10 U.S.C. §918), and rape (Article 120, 10 U.S.C. §920(a)).

Analyzing the cases on this issue, the Ninth Circuit has concluded:

> If the "will and . . . moral values of the people," [*Gregg v. Georgia*] at 175, 96 S.Ct. at 2926, are particularly important in sentencing decisions, and if specification of punishments is therefore peculiarly a legislative function, then specifying the circumstances under which someone may be put to death must also be a function of the elected representatives of the people. It is for that reason that, in finding Georgia's revised procedures constitutional, the Court emphasized that the guidelines were statutory: "[Under the revised Georgia procedures, the jury] must find a *statutory* aggravating circumstance before recommending a sentence of death." *Gregg*, 428 U.S. at 197, 96 S.Ct. at 2936 (emphasis in original). The Court has thus plainly required that guidelines be expressly articulated *by the legislature* in the statute authorizing the death penalty.



*United States v. Harper*, 729 F.2d 1216, 1225 (9th Cir. 1984)(emphasis in original). The government itself agreed in *Harper* that the promulgation of aggravating factors is a legislative function:

> The conclusion that the Constitution requires legislative guidelines in death penalty cases is thus inescapable. That is the position not only of petitioner, but also of the government . . . .

*Id.*

Given this consensus, it is no surprise that this Court in *Gregg* and its companion cases provided that only *legislative* action could remedy defective sentencing plans, or that every one of the thirty-seven states that have reinstituted the death penalty since *Furman* did so by legislative, not executive, action. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983)("Our cases indicate, then, that *statutory* aggravating circumstances play a constitutionally necessary function at the stage of *legislative definition* . . . .")(emphasis added).

The need to keep each branch from encroaching on the others is even greater in the military justice system, where failure to enforce limits can easily lead to "a military branch unchecked by the *legislature* and susceptible of use by an arbitrary *executive* power." *Reid v. Covert*, 354 U.S. at 68 (Harlan, J., concurring)(emphasis in original, footnote omitted).

> If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those sub-

> ject to military trials. Such blending of functions in one branch of the government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

*Id.* at 38-39 (plurality opinion).[3]

## II. CONGRESS HAS NOT DELEGATED ITS AUTHORITY TO ENACT A DEATH PENALTY

This Court has long insisted that "the integrity and maintenance of the system of government ordained by the Constitution" generally forbid Congress to delegate its legislative power to another branch of government. *Field v. Clark*, 143 U.S. 649, 692 (1892). This "non-delegation doctrine," *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *see Mistretta v. United States*, 488 U.S. at 371, expresses a strong presumption against delegation.

In its decision below, the United States Court of Appeals for the Armed Forces[4] nevertheless held that, in promulgating Rule 1004, the President was acting pursuant to a congressional delegation. Any analysis of that contention must begin with the recognition that, unlike the delegations upheld in *Mistretta v. United States*, 448 U.S. 361 (sentencing commission); or *Morrison v. Olson*, 487 U.S. 654 (special prosecutor); or even those struck down in *I.N.S. v. Chadha*, 462 U.S. 919 (one-house veto); or *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)(industry codes of fair competition), there was no explicit delegation here. Accordingly, any delegation to the President to define capital crimes must be inferred. That difference alone, combined with the presumption against delegation inherent in the nondelegation principle, is enough to defeat a claim of delegation. *See* Point I of Petitioner's Brief, and cases cited therein. We are aware of no decision of this Court upholding a delegation of legislative authority in the absence of explicit congressional action.

There is far more, however, to rebut the argument that Congress here delegated its powers to define capital crimes. Not only was there no explicit delegation, but logic and common sense compel the conclusion that Congress could not even have contemplated delegating its power to define what conduct would subject a defendant to the military death penalty. The Uniform Code of Military Justice was enacted in 1950, over two decades before *Furman* required stricter definitions of capital crimes, and thirty-four years before the President promulgated Rule 1004. It is fantasy to ascribe to Congress the prescience of anticipating *Furman*, *Gregg*, *Matthews* and the need over thirty years later to define capital crimes more narrowly, *and* to attribute to Congress the decision to leave those definitions to another branch of government.

The government has argued that the promulgation of Rule 1004 fell within presidential authority under Article 36 of the U.C.M.J., 10 U.S.C. §836, to prescribe trial procedures. That authority has heretofore always been interpreted to authorize only strictly procedural regulations. "[T]he Court of Military Appeals has indicated its belief that Congress did not and could not empower the President to pro-

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[3] While the military and civilian communities remain different in many respects, *see Parker v. Levy*, 417 U.S. 733 (1974), the U.S. Court of Appeals for the Armed Forces has recognized that, at least with regard to offenses not committed in combat or in violation of the law of war, applying lower standards in capital cases would be inconsistent with the intent of the Eighth Amendment and of Article 55, 10 U.S.C. §855 (which prohibits cruel or [sic] unusual punishment in the military). *United States v. Matthews*, 16 M.J. at 368-69.

[4] The Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces in 1994.

mulgate substantive rules of law for the military." *Parker v. Levy*, 417 U.S. at 785 n.36. *E.g.*, *United States v. Barnes*, 14 U.S.C.M.A. 567, 569 (1964)("Presidential authority in the premises is limited to the promulgation of rules of procedure and modes of proof rather than encompassing matters of substantive law"); *United States v. Smith*, 13 U.S.C.M.A. 105, 119 (1962)("Congress did not delegate to the President the authority to fix substantive rules").

Because of this narrow delegation, the government has been at pains to squeeze Rule 1004 under the "procedural" rubric of Article 36. In fact, Rule 1004 contains both procedural and substantive elements. The procedural portions are found in subsection (b), which is labelled, appropriately, "Procedure," and which deals with requirements of notice, rules of evidence, voting procedures, and the announcement of a verdict. Following the "Procedure" subsection is a separate subsection, labelled "(c) Aggravating factors." That subsection -- the one at issue in this case -- defines what actions or behavior will subject an accused to the death penalty. Only if a court-martial finds beyond a reasonable doubt that the accused engaged in the conduct so defined may it impose a sentence of death.

There is nothing to distinguish the aggravating factors in subsection (c) from other elements of substantive proof. They define the behavior that will subject an accused to a particular punishment -- in other words, they define a crime. Like other elements of a crime, they must be proved beyond a reasonable doubt,[5] and must be the subject of instructions by the military judge.[6] It is therefore no surprise that these definitions of conduct punishable by death are not included in the "Procedure" section of Rule 1004, and are never referred to in the Rules as procedures. That conclusion from the face of the regulation, and from its substance, is reinforced by decisions of this Court, all of which classify aggravating factors in capital sentencing statutes as substantive. *Bullington v. Missouri*, 451 U.S. 430, 433, 438 (1981) (aggravating factors are "substantive standards to guide the discretion of the sentencer," and are distinguishable from "procedural safeguards"); *California v. Ramos*, 463 U.S. 992, 1000 n.11 (1983)(aggravating circumstances are "substantive factors chosen to narrow the class of defendants eligible for the death penalty"); *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984)(sentencing decision is guided by "substantive standards").[7] *See Sawyer v. Whitley*, 505 U.S. __ , 112 S.Ct. 2514, 2522 (1992), defining aggravating factors as "statutory definitions" that, like elements of the crime, "narrow the class of defendants eligible for the death penalty."

*Ramos*, moreover, relies on *Gregg* in emphasizing the importance of the legislative branch in designating the aggravating factors that will justify the imposition of death. As *Gregg* stressed, the jury must be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." 428 U.S. at 192. *Gregg* furthermore explained that "[t]he deference we owe to the

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[5] R.C.M. 1004(c).

[6] R.C.M. 1004(b)(6).

[7] The government has relied on *Dobbert v. Florida*, 432 U.S. 282 (1977) -- holding that a change in the Florida capital punishment statute is procedural for *ex post facto* analysis -- to suggest that R.C.M. 1004 is a procedural provision. *Dobbert* addressed the type of procedural matter found in subsection (b) of the Rule (transferring the sentencing determination from judge to jury). Such a procedural change is critically different from the substantive addition of aggravating factors found in subsection (c). *See State v. Correll*, 715 P.2d 721 (Ariz.Sup.Ct. 1986)(*en banc*)(distinguishing *Dobbert* and holding a statute listing new aggravating factors for capital sentencing to be substantive). *Accord State v. Jordan*, 440 So.2d 716 (La.Sup.Ct. 1983).

decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" *Id.* at 192 (citations omitted).

The President's other powers with regard to courts-martial are even weaker bases for the promulgation of Rule 1004. Article 56 of the U.C.M.J., 10 U.S.C. §856, provides: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." As is apparent from its legislative history,[8] Article 56 was never intended to authorize the President to define crimes or set standards of conduct that subject an accused to a death sentence. In particular, Article 56 does not grant the President authority to define conduct that is punishable by death. To the contrary, throughout the punitive articles of the Code, Congress reserved to itself the power to authorize death sentences. In each instance where the Code authorizes a death sentence, that sentence is specified in the punitive article itself. Congress never left to the President the power to specify capital punishment under the general authority to sentence "as a court-martial may direct." Thus, while Article 56 provides the basis for promulgation of maximum punishments, it has no application to Article 118, 10 U.S.C. §918,[9] or other capital articles of the Code, where Congress preempted the field by itself specifying the punishment.

It is no answer to say that the President by Rule 1004 is merely setting a limit on the punishment for an offense.

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[8] Uniform Code of Military Justice, Hearings on H.R. 2498 before a Subcommittee of the House Armed Services Committee, 81st Cong., 1st Sess. 565 (1949), *reprinted in* Index and Legislative History, Uniform Code of Military Justice at 1087-89 (1950).

[9] Article 118 of the U.C.M.J. provides for the punishment of premeditated murder.



Rule 1004 *defines* the offense. The lesson of *Furman* and *Matthews* is that Article 118 by itself is inadequate to define a capital crime. The President's actions in defining the narrowing elements of the crime go impermissibly beyond providing a maximum punishment for a crime that Congress has defined.

Although courts have disagreed over *Furman*'s impact on the portions of capital statutes that do not contain death penalty, *compare United States v. Watson*, 496 F.2d 112 (4th Cir. 1973), *with United States v. Shepherd*, 576 F.2d 719, 727-29 (7th Cir. 1978), they are in agreement that *Furman* invalidated any death sentence provisions that did not give the sentencing body direction to "minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. at 189. *See United States v. Kennedy*, 618 F.2d 557 (9th Cir. 1980); *United States v. Shepherd*, 576 F.2d 719; *United States v. Watson*, 496 F.2d 112.[10]

To a degree, the question whether *Furman* "invalidated" Article 118 is largely a semantic one, because *Furman* made clear that the statute was inadequate. Without a clear definition of the behavior that will subject an accused to the death penalty, the statute is missing essential elements, and cannot stand. *See Matthews*, 16 M.J. 354. The determination of what those elements will be is a legislative task.

It is thus apparent that Congress has not delegated to the President the authority to define conduct that is punishable by death. Congress, in fact, has had ample opportunity

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[10] This Court has never directly addressed the survival of pre-*Furman* statutes, and its *dicta* are conflicting. *Compare Furman*, 408 U.S. at 417-18 (Powell, J., dissenting)(Because of the constitutional ruling "numerous provisions of the Criminal Code of the United States and of the Uniform Code of Military Justice also are voided"), *and* 408 U.S. at 412 (Blackmun, J., dissenting), *with Thompson v. Oklahoma*, 487 U.S. 815, 877 n.1 (1988)(Scalia, J., dissenting).

to exercise its power to enact a general military death penalty, and has not done so. Where it has mustered a sufficient political consensus -- as in the case of air piracy (49 U.S.C. §1473); drug racketeering (21 U.S.C. §848); and espionage (Article 106a, 10 U.S.C. §906a) -- it has acted. No such consensus has emerged since *Furman* to reinstate the death penalty for murder under the Code.[11] In fact, in 1985 and 1987, Congress twice considered a bill that would have adopted the aggravating factors in Rule 1004. H.R. 3652, introduced October 30, 1985; H.R. 731, introduced January 22, 1987. Those bills were defeated.

Moreover, in those limited instances where Congress has enacted a federal death penalty, it has often included special safeguards that are noticeably absent in Rule 1004 and that may well have affected Pvt. Loving's trial. For example, in enacting the Omnibus Drug Initiative Act of 1988 Pub.L.No. 100-690, 102 Stat. 4181-4545, Congress provided not only that special jury instructions be given to avoid racial prejudice in sentencing, but that the Comptroller General of the United States formally study and report to Congress on practices in capital cases, to determine the risk of discriminatory application of the death penalty. 21 U.S.C. §848(o). Appellant here did not receive the benefit of any such instruction, or any such study, because Rule 1004 -- purportedly issued pursuant to congressional delegation -- provides for neither.[12] As a result, appellant received less

[11] The Federal Death Penalty Act of 1994, 18 U.S.C. §§3591-98, specifically exempts crimes prosecuted under the U.C.M.J. *Id.* at §3591, note.

[12] The risk of racially disproportionate application of the military death penalty is real. Of the 12 military executions since 1951, 11 were of African-Americans. Six of the 8 defendants now on the military's death row are African-Americans; one is white and one is a native of Guam. "Military Death Row: Separate, Not Equal," Sullivan, Dwight [Major, U.S.M.C.], National Law Journal, Nov. 6, 1995, A19.



protection at trial than if he had committed murder in the course of a continuing criminal drug enterprise. Thus, even if a conclusion were warranted that Congress intended the President to enact *some* death penalty for murder in the military, there is no way of knowing what aggravating factors or other substantive requirements Congress would have the President include, and no basis for concluding that the President's actions are consistent with Congress's unknown intent.

## III. ANY CONGRESSIONAL DELEGATION OF AUTHORITY TO ENACT A DEATH PENALTY IS LACKING IN CONSTITUTIONALLY REQUIRED GUIDELINES

This inadequate guidance from Congress not only negates any inference of delegation, but would render any delegation, if inferred, violative of constitutional standards.

Congressional delegation of the power to legislate is constitutional only if Congress provides "sufficiently specific and detailed" guidelines to the executive. *Mistretta v. United States*, 488 U.S. at 374. The proper analysis of delegation issues was set forth in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935):

> [W]e look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

Applying this test, this Court has upheld delegation to the Federal Sentencing Commission where Congress itself prescribed the system of guidelines to be used, provided

mandatory sentencing ratios, and listed seven specific criteria for categorizing offenses and other guidelines for classes of offenders and offenses. *Mistretta v. United States*, 488 U.S. at 374-77. It has upheld delegation to rate and price administrators within areas of their special expertise, *e.g.*, *Yakus v. United States*, 321 U.S. 414, 425 (1944); and it has upheld delegations accompanied by other specific statutory guidelines, *see, e.g.*, *Field v. Clark* 143 U.S. 649. In each instance -- unlike the circumstances here -- there was no doubt whatsoever that Congress had established a policy, set up a standard, and explicitly delegated specific tasks to another branch of government.

What this Court has never done is uphold a standardless delegation like the one even arguably at issue here. In *Panama Refining*, the Secretary of the Interior prohibited interstate transportation of certain petroleum products. Even though Congress in the National Industrial Recovery Act had expressly delegated such authority to the executive, the delegation was held unlawful because Congress had "declared no policy . . . established no standard . . . [and] laid down no rule." 293 U.S. at 430. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, the Court struck down a code of fair competition promulgated by the President because Congress, despite defining its general purposes, had failed to define "fair competition" or to set up standards for the President to follow in promulgating the code.

Here, there is no evidence that, when the President issued Rule 1004, Congress had even "declared a policy," *Panama Refining*, 293 U.S. at 415, with regard to the death penalty for murder. Certainly, Congress had not "set up a standard" or "required any finding" for a military death penalty for murder -- the other requirements for a constitutional delegation.



The only standard the court below was able to identify was the requirement in Article 36 that the President "shall, so far as he considers practicable, apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts." These words do not even inform the President whether, after *Furman* and *Matthews*, Congress intended to impose the death penalty for violations of Article 118. They certainly do not provide the Executive with any guidelines for enacting aggravating factors, or for determining whether to provide mitigating factors, or even for deciding whether to employ a weighing test or some other standard to evaluate the evidence. These defects doom any argument that Congress has provided the Executive with constitutionally sufficient guidelines to validate a delegation of legislative power.

Finally, this case differs from *Mistretta*, where "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders [was] precisely the sort of labor-intensive task for which delegation to an expert body is especially appropriate." 488 U.S. at 379. Enacting a post-*Furman* death penalty was well within the capacity of thirty-seven state legislatures and of Congress itself. It is not the inability of Congress to pass a death penalty that is at issue here. It is the President's assumption of power to do so where Congress has not.

The lack of a proper delegation is even more significant in the case of military justice, when viewed in the context of this country's historical fear of the concentration of military power in the hands of the Executive. The constitutional power to make regulations for the land and naval forces was given to Congress, not to the President. U.S. Const., Art. I, §8, cl. 14. *See* 2 J. Story, *supra* p.3, §1197 at 108. Concern about the peacetime military power of the executive is especially evident with respect to courts-martial. *Solorio* was premised on an understanding that concerns about the

scope of military jurisdiction were assuaged by legislative control. "The unqualified language of Clause 14 suggests that whatever these concerns, they were met by vesting in Congress, rather than the Executive, authority to make rules for the government of the military." 483 U.S. at 446 (footnote omitted).

To concentrate further power over military justice in the President, by adding the authority to define conduct punishable by death, raises far greater concerns than those raised in *Mistretta*.[13] Reliance on a dubious claim of delegation would create the objectionable "blending of functions in one branch" that this Court feared in *Mistretta* and avoided in *Reid v. Covert*.

[13] "Indeed, had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally . . . had united the power to prosecute and the power to sentence within one Branch." *Mistretta*, 488 U.S. at 391 n.17.



## CONCLUSION

The judgment of the United States Court of Appeals for the Armed Forces should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING,

*Petitioner*,

—v.—

UNITED STATES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

## BRIEF *AMICUS CURIAE* OF MARCI A. HAMILTON AND DAVID SCHOENBROD IN SUPPORT OF PETITIONER

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## PERMISSION TO FILE BRIEF AS AMICI CURIAE

Professors Marci A. Hamilton and David Schoenbrod file this brief as *amici curiae* on behalf of the Petitioner, pursuant to Rule 37.3, accompanied by a letter of the Petitioner, dated October 24, 1995, and a letter of the Respondent, dated October 30, 1995, by which counsel for the parties evidenced their consent to the filing of this *amicus curiae* brief.

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No. 94-1966

In The

# Supreme Court of the United States

October Term, 1995

DWIGHT J. LOVING,

*Petitioner*,

v.

UNITED STATES,

*Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Armed Forces

## BRIEF *AMICUS CURIAE* OF MARCI A. HAMILTON AND DAVID SCHOENBROD IN SUPPORT OF PETITIONER

## INTERESTS OF AMICI CURIAE

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Press, 1993) and is co-author of *Remedies: Public and Private* (West Pub., 1990).[1]

We submit this brief in the hope that what we have learned from our study of the delegation of legislative power may assist the Court in addressing the question whether Congress constitutionally delegated to the President the power to make the death penalty law under which Dwight Loving was sentenced to death.

## SUMMARY OF ARGUMENT

The requirement in Article I of the Constitution that Congress take responsibility for making national policy decisions serves the ends of democratic accountability and liberty. Under any reasonable interpretation of Article I, Congress's failure to embrace its constitutional responsibilities to determine aggravating factors in military death penalty cases is unconstitutional, undermines accountability, and infringes upon liberty.

The nondelegation doctrine requires the Court only to demarcate the boundaries of Article I power. How that power is exercised within those boundaries remains the province of the Congress. There is no practical or political impediment to Congress bringing its legislative practices into line with Article I.

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[1] The views expressed in this brief are those of Marci A. Hamilton and David Schoenbrod and do not represent the views of the institutions with which they are affiliated.



Congress's passive and inferred acquiescence to the President's ad hoc determination of aggravating factors in military death penalty proceedings does not satisfy any of the nondelegation standards the Court has articulated. If Congress is to bring its practices into line with Article I, however, a clearer statement of Article I's limits is required. We urge the Court to return to its original understanding of the nondelegation principle.

## ARGUMENT

### I. DELEGATION OF THE POWER TO DETERMINE AGGRAVATING FACTORS IS INCONSISTENT WITH THE PURPOSES OF THE NONDELEGATION DOCTRINE

The Constitution reposes lawmaking responsibility in the legislative branch and places limits on the power of Congress to delegate its responsibility to make the law. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *Field v. Clark*, 143 U.S. 649, 692 (1892); *see also* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, 544-54 (1994) (discussing independent decisionmaking responsibility of legislators). Thus, the question is not whether, but rather to what extent, Article I prohibits Congress from delegating legislative power. Although conceptions of that limit vary, under any reasonable conception, that limit is exceeded in this case.

The nondelegation doctrine has two purposes: democratic accountability and the protection of liberty. *See Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., concurring). (1963). By ensuring that the lawmaking power reposed in the people's elected representatives remains with the legislature, the nondelegation doctrine fosters democratic accountability. *E.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406-07 (1928). Article I grants Congress broad power to make national policy precisely because it is the most accountable branch.

The Framers believed that requiring the laws to be enacted by majorities in a bicameral legislature and then presented to the president would discourage those intrusions on liberty that lack broad public support. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *The Federalist No.* 73 at 494-95 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961). This means of protecting liberty antedates, undergirds, and compliments the protection of rights later enumerated in the Bill of Rights. David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* at 28-31 (1993); Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 Ga. L. Rev. 81, 86-90 (1994).

Both of these purposes to establish democratic accountability and to protect liberty are undercut when Congress does not take affirmative responsibility for the laws. Legislators escape accountability for the law at the next election and impositions on liberty do not have to garner sufficient popular support to get through the Article I legislative process.



In this case, Congress neither stated the governing law nor stated the principles that the President should follow in making it. Indeed, Congress at most *implicitly* delegated the power to make the law. In other words, before the President made the death penalty law, Congress took no responsibility for it. After the President made the law, a congressional conference report disclaimed any intention of changing what *he* had done, thereby washing its hands of the matter. H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 8 (1985), *reprinted in* 1985 U.S.C.C.A.N. 571, 579. At most, Congress passively acquiesced in the President's death penalty law. Congress's failure to object to executive action does not amount to the affirmative taking of responsibility needed to serve the purposes of the nondelegation doctrine. *See* Schoenbrod *supra*, at chs. 6, 7. So, in contrast to the requirement of Article I that the House, the Senate, and the President take responsibility for legislative acts (unless, of course, the President vetoes the act and the House and Senate override the veto), it was the President alone who took responsibility for the death penalty law under which Dwight Loving was sentenced.

## II. THE COURT SHOULD CALL UPON CONGRESS TO HELP DETERMINE HOW BEST TO BRING ITS LEGISLATIVE PRACTICE IN LINE WITH ARTICLE I

The Court could decide this case by holding that those faced with the death penalty have a special right under the Fifth and Eighth Amendments for the legislature to make the death penalty law. *Furman v. Georgia*, 408 U.S. 238, 256 (Douglas, J., concurring), 283-84 (Brennan, J., concurring) (1972); *Gregg v. Georgia*, 428 U.S. 153, 174-76 (1976); *see also Zant v. Stephens*, 462 U.S. 862, 877 (1983) (upholding statutory

aggravating circumstances as adequately narrowing expanse of death penalty). In a federal system, the narrower ground, however, is that Congress's failure to make the death penalty law conflicts with Article I's assignment to it of the legislative power. That the delegation issue is the narrower ground follows from *Plaut v. Spendthrift Farm, Inc.*,___ U.S. ___, 115 S.Ct. 1447, 1452 (1995):

> Respondents submit that § 27A(b) violates both the separation of powers and the Due Process Clause of the Fifth Amendment. Because the latter submission, if correct, might dictate a similar result in a challenge to state legislation under the Fourteenth Amendment, the former is the narrower ground for adjudication of the constitutional questions in the case, and we therefore consider it first.

*Id.* (footnote omitted) (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

Whether the Court finds that the statute in this case delegates unconstitutionally or interprets it to avoid this constitutional issue, the Court faces the task in this case of clarifying the test for unconstitutional delegation. That task is a difficult one because any test that fully serves the purposes of Article I conflicts with much modern legislative practice.

Fortunately, however, the burden of upholding the Constitution is not the Court's alone. As Justice Kennedy, joined by Justice O'Connor, stated in his concurring opinion in the decision in *United States v. Lopez*, ____ U.S. ____, 115 S.Ct. 1624, 1639 (1995):



> [I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.
>
> At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.

*Lopez* signals the Court's increasing readiness to provide meaningful boundaries to the limited powers accorded Congress in Article I. Clarifying the nondelegation doctrine is another part of that project. Similarly, courts in other contexts have called upon the political branches to help solve constitutional problems. *E.g.*, *Virginia v. West Virginia*, 246 U.S. 565, 605 (1918) (calling upon Congress to legislate a solution to an interstate impasse); *McDuffy v. Secretary of [the] Executive Office of Education*, 415 Mass. 545, 620-21, 615 N.E.2d 516, 555-56 (1993) (asking legislators and executives of the Commonwealth and its local governments, who had violated a state constitutional requirement, to provide an adequate

education to define the precise nature of the task which they face in fulfilling their constitutional duty ).[2]

We urge the Court to decide that the supposed delegation in this case cannot stand under any conceivable test of delegation and call upon Congress to bring legislative practice in line with Article I. Enforcing Article I's prohibition on delegation raises the reasonable concern that the Court will be placing difficult burdens on Congress. Clarifying and strengthening the nondelegation doctrine, however, does not place impossible burdens upon Congress. Nor does it require the Court to be the sole branch to identify and redress the problems resulting from too much delegation for too long. Congress can straightforwardly and legitimately repair violations of the nondelegation doctrine through the legislative process. One sensible approach among others that Congress could take is described in an article by now-Justice Breyer in which he suggested that Congress could respond to the decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), by enacting a statute requiring that agency

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[2] Paul R. Dimond, Brown *and the Transformation of the Constitution: Concluding Remarks*, 61 Fordham L.Rev. 63, 65-66 (1992) states:

> We should concede that the more massive and entrenched the wrong of discrimination, the more important it is for the courts to declare the full extent of that wrong. The courts must also permit the ultimate remedy to be worked out in a political process in which those who are aggrieved will at least have a continuing claim that the declared wrong cannot be remedied in the courts alone.

*Id.* (footnote omitted).



regulations be enacted through the legislative process rather than promulgated as agency rules. Stephen Breyer, *The Legislative Veto After* Chadha, 72 Geo. L. Rev. 785 (1984). He offered many variations on this approach, such as an expedited legislative process, *id.* at 793-94, which would take less time than judicial review of agency regulations.

It is not politically impossible for Congress to meet the demands of the nondelegation doctrine. Not only do practical legislative mechanisms exist to cure the delegation problem, but, in addition, public opinion is calling for a more accountable government. In response, promises are being made to "restore accountability to Congress." "Contract with America" (1994). Members of the House from both parties have formed a Constitutional Caucus to ensure that Congress considers it constitutional duties in the legislative process. Other members of Congress undoubtedly take seriously their oaths to uphold the Constitution.

If the Court were to hold that Congress's passive refusal to take responsibility for the death penalty law in this case violates Article I, it would not be required to embrace any particular legislative approach or any one faction in the already initiated debate over how to make government more accountable. Rather, the Court's role would be limited to its appointed one of identifying constitutional boundaries.

## III. THE NONDELEGATION DOCTRINE

From the earliest days of the Constitution, there is ample evidence that both the Framers and this Court believed that representatives should be required to make the hard policy choices and that the Court took the nondelegation doctrine

seriously. *See* Schoenbrod *supra*, at 30-34 (collecting examples from 18th and 19th centuries). In the twentieth century, three cases invalidated statutes on delegation grounds prior to the New Deal: *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter, amend or revise the maritime law" to states); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88, 92-93 (1921) (holding that a vague statute "amounted to a delegation by Congress of legislative power to courts . . . ."). *Id.* at 86-87. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (holding improper delegation of maritime law to the states). These cases were followed by the two most well-known nondelegation cases, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432-33 (1935), which struck down New Deal legislation by votes of 8-1 and 9-0, respectively.

Many cases since the New Deal have invalidated executive lawmaking. For example,

- *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976), struck down a statute for delegating to the Civil Service Commission the power to make a law preventing legal aliens from holding civil service jobs. *Id.* at 122 (Rehnquist, J., dissenting).
- *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) struck down hundreds of statutes that delegated to one or two houses of Congress the lawmaking power delegated by the Constitution to the Article I legislative process. *Id.* at 986-87 (White, J., dissenting).
- Void for vagueness cases not only require that the public be given notice of what is forbidden, but deny to executive officials the power to make the law. *E.g.*, *Smith v. Goguen*, 415 U.S. 566, 575 (1974).[3]
- Various cases have struck down city ordinances and state or federal statutes delegating overly broad discretion to regulate or punish speech or religion. *See generally* Laurence H. Tribe, American Constitutional Law §§12-38 (2d ed. 1988).
- Various cases have interpreted statutes to avoid perceived delegation problems, although the net effect is that the courts made the legislative policy decisions not made by Congress. *E.g.*, *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 611-12 (1980); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974).



Even though the Court has voided laws made by the executive in a significant number of cases, it has not landed upon a single coherent test to guide Congress and the executive in their future dealings. The present state of the case law is unsatisfactory for two reasons.

First, it is internally inconsistent. Justices with diverse viewpoints have often expressed concern that the Court's nondelegation doctrine is internally contradictory. *See e.g.*, *Smith v. Goguen*, 415 U.S. 566, 591-604 (1974) (Rehnquist, J.,

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[3] The void for vagueness doctrine applies to civil as well as criminal offenses, *Jordan v. De George*, 341 U.S. 223, 231, *reh'g denied* 341 U.S. 956 (1951), and statutes that delegate to agencies often make violations of agency created laws a criminal offense.

dissenting); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 112 (1976) (Rehnquist, J., dissenting); *American Petroleum Institute*, 448 U.S. at 717-18 n.30 (Marshall, J., joined by Brennan, White, and Blackmun, J.J., dissenting); *National Cable Television Ass'n*, 415 U.S. at 352-54 (Marshall, J., joined by Brennan, J., dissenting); *Chada*, 462 U.S. at 986-87 (White, J., dissenting); *see also* Schoenbrod *supra*, at 40-45, 181. This case offers the Court the opportunity to provide clearer guidance on the constitutional principles that should guide Congress in its dealings with the executive branch.

Second, what the preceding listing of cases does not reveal is that the Court has also affirmed delegations in which Congress had not made the hard choices. *E.g.*, *Mistretta*, 488 U.S. at 422 (Scalia J., dissenting); United States v. Rock Royal Cooperative, 307 U.S. 533, 574-76 (1939) (upholding statute that delegated authority to make regulations to create "orderly" markets while taking the interest of consumers into account). .

Because of the Court's generally inconsistent application of the nondelegation principle, Congress and the President have not received a very clear picture of their responsibility under the Constitution. When the Court has struck legislative delegations, the existing jurisprudence has left it open to the charge that it meddles in policy. When the Court has affirmed delegations in which Congress has not made the hard choices, it has tended to legitimate legislative practices that undermine democratic accountability and liberty.

These consequences flow from the Court's departure from the limits on delegation originally conceived by the Framers and enunciated in early Supreme Court cases. The Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress . . . ." U.S. Const. art. I, § 1. The legislative power is to make rules of private conduct, as



*Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (Marshall, C.J.), made clear: "[it] is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Id.* at 136; *see also Plaut v. Spendthrift Farm, Inc.*, ___ U.S. ___, 115 S.Ct. 1447, 1455 (1995); Schoenbrod *supra* at 30-31, 156-57. An invigorated nondelegation doctrine means that, subject to the other constraints of the Constitution, Congress alone may make the rules that govern private persons and states. Congress can leave to other branches the interpretation and application of those rules, as well as functions that are not Article I legislative powers, such as the management of government departments and property. *See* Schoenbrod *supra*, at ch. 12 (discussing the application of this test). Such a test of unconstitutional delegation is consistent with the purpose of Article I. Branches other than the legislative will face hard decisions in, for example, interpreting statutes and in exercising prosecutorial and remedial discretion; but it is the legislators who will have to face the hard legislative policy choices and take responsibility for their resolution. In stating rules of conduct, the legislature cannot simply promise the best of everything to everyone, but rather must make manifest the costs, as well as the benefits of its actions. *See generally* Schoenbrod *supra*, at 183-84.

Unfortunately, the Court began to move away from this original understanding of Article I during the Progressive era, with its now discredited faith that expert agencies could disinterestedly and dispassionately provide scientific answers to public policy disputes. Schoenbrod *supra*, at 31-36. The new test of unconstitutional delegation required that the Congress provide an "intelligible principle" to agency lawmakers. *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). At points, the Court hinted that an "intelligible principle" is a

rule of conduct, *Yakus v. United States*, 321 U.S. 414, 424-25 (1944); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), but generally it meant that Congress need only state its goals. *E.g.*, *Mistretta*, 488 U.S. at 372-73; *Rock Royal Cooperative*, 307 U.S. at 574. Congress, following the path of least political resistance, came to state as its goals only the popular goals of the regulatory program that it was launching, leaving it to the agencies to deal with the conflicts between those goals and the costs of achieving them. In sum, the Court's intelligible principle test has come to mean that Congress is too often tempted to take the credit for the popular and shift to the agency the blame for the unpopular. Schoenbrod *supra*, at chs. 5, 8. In the course of judicial review of agency choices, the courts as well as agencies have been drawn into making the legislative choices that Congress is required to take under Article I. Antonin Scalia, *A Note on the* Benzene *Case*, 4 Reg. 25, 28 (July-Aug. 1980); Carl McGowan, *Congress, Courts, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1120 (1977).

Although the intelligibile principle rule surely invalidates Congress's abdication of responsibility in this case, it has failed to hold the line on Congress's natural temptation to avoid difficult policy choices. This case provides the Court an opportunity to identify a particularly egregious congressional delegation and to send a message to Congress that Article I forbids delegating the power to make the laws that govern society.



## CONCLUSION

The post-New Deal Court is rightly reluctant to interfere with legislative outcomes and especially social policy choices. There should be no similar reluctance to call upon *Congress* to make the policy choices entrusted to it by Article I. Accordingly, we urge the Court to hold that Congress's failure to embrace its responsibility to set out the aggravating factors for military death penalty determinations invalidates the death penalty standards promulgated by the President.

Respectfully submitted,

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In The
# Supreme Court of the United States
October Term, 1995

DWIGHT J. LOVING, *Petitioner,*

*v.*

UNITED STATES OF AMERICA, *Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

## BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Was the President's promulgation of constitutionally-required aggravating factors for death penalty offenses in the military (a) executed pursuant to an implicit delegation of legislative authority by Congress; (b) if there was such a delegation, did Congress do so with sufficient specificity to establish the policy and limits of the delegated authority; and, (c) would such a delegation violate the doctrine of separation of powers?

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*Ex parte Mason*, 105 U.S. 696 (1881) . . . . . 9
*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) . . . . . 18
*Furman v. Georgia*, 408 U.S. 238 (1972) . . . . 2, 3, 14, 15
*Grafton v. United States* 206 U.S. 333 (1907) . . . . . 24
*Greene v. McElroy*, 360 U.S. 474 (1959) . . . . . 6
*Gregg v. Georgia*, 428 U.S. 153 (1976) . . . . . 2, 3, 15
*Immigration & Naturalization Service v. Chada*, 462 U.S. 919 (1983) . . . . . 6
*Kahn v. Anderson*, 255 U.S. 1 (1921) . . . . . 10
*Kent v. Dulles*, 357 U.S. 116 (1958) . . . . . 6
*Lee v. Madigan*, 358 U.S. 228 (1959) . . . . . 7, 19
*J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) . . . . . 12
*Metropolitan Washington Airports Auth. v. Citizens*, 501 U.S. 252 (1991) . . . . . 16
*Mistretta v. United States*, 488 U.S. 361 (1989) . . . . . 12, 13, 14, 16
*Morrison v. Olson*, 487 U.S. 654 (1988) . . . . . 16
*Parker v. Levy*, 417 U.S. 733 (1974) . . . . . 24
*Reid v. Covert*, 354 U.S. 1 (1957) . . . . . *passim*
*Schall v. Martin*, 467 U.S. 253 (1984) . . . . . 5
*Solorio v. United States*, 483 U.S. 435 (1987) . . . . *passim*
*Touby v. United States*, 500 U.S. 160 (1991) . . . . . 14
*United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991) . . . . . 5, 6
*United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984) . . . . . 15

*United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) . . . . . 2, 3
*Weiss v. United States*, 114 S.Ct. 752 (1994) . . . . . 17
*Whalen v. United States*, 445 U.S. 684 (1980) . . . . . 5
*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) . . . . . 4
*Zant v. Stephens*, 462 U.S. 862 (1983) . . . . . 17

***Constitutional Provisions:***

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U.S. Const. art. I, § 8, cl. 14 . . . . . 17, 18
U.S. Const. art. II, § 1 . . . . . 17
U.S. Const. art. II, § 2 . . . . . 17
U.S. Const. art. III . . . . . 17

***Statutes and Rules:***

18 U.S.C. § 3551 et seq . . . . . 13
18 U.S.C. § 3592 . . . . . 5, 14
28 U.S.C. §§ 991-998 . . . . . 13
28 U.S.C. § 1259(3) . . . . . 18
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UCMJ art. 25, 10 U.S.C. § 825 . . . . . 17
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UCMJ art. 34, 10 U.S.C. § 834 . . . . . 17
UCMJ art. 36, 10 U.S.C. § 836 . . . . . *passim*
UCMJ art. 37, 10 U.S.C. § 837 . . . . . 11
UCMJ art. 66, 10 U.S.C. § 866 . . . . . 17
UCMJ art. 67, 10 U.S.C. § 867 . . . . . 11, 18
UCMJ art. 67a, 10 U.S.C. § 867a . . . . . 18
UCMJ arts. 141-145, 10 U.S.C. §§ 941-945 . . . . . 17



UCMJ art. 85, 10 U.S.C. § 885 . . . . . 3
UCMJ art. 94, 10 U.S.C. § 894 . . . . . 3
UCMJ art. 99, 10 U.S.C. § 899 . . . . . 3
UCMJ art. 100, 10 U.S.C. § 900 . . . . . 3
UCMJ art. 101, 10 U.S.C. § 901 . . . . . 4
UCMJ art. 102, 10 U.S.C. § 902 . . . . . 4
UCMJ art. 104, 10 U.S.C. § 904 . . . . . 4
UCMJ art. 106, 10 U.S.C. § 906 . . . . . 4
UCMJ art. 106a, 10 U.S.C. § 906a . . . . . 4, 5, 6
UCMJ art. 113, 10 U.S.C. § 913 . . . . . 4
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UCMJ art. 120, 10 U.S.C. § 920 . . . . . 4, 10
UCMJ art. 134, 10 U.S.C. § 934 . . . . . 10, 24
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1004 . . . . . *passim*

***Legal Periodicals:***

2 William Winthrop, *Military Law and Precedents* (1896) . . . . . 9, 24
Francis T. McCoy, *Due Process for Servicemen -- The Military Justice Act of 1968*, 11 Wm. & Mary L. Rev. 66 (1969) . . . 24
Francis T. McCoy, *Equal Justice for Servicemen: The Situation Before and Since O'Callahan v. Parker*, 16 N.Y.L.F. 1 (1970) . . . . . 24
Grant W. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 Minn. L. Rev. 1 (1969) . . . . . 21-22, 23
Lieutenant Keith J. Allred, Comment, *Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court-Martial Size and Voting Requirements*, 35 Nav. L. Rev. 153 (1986) . . . . . 22, 23

Robert D. Duke & Howard S. Vogel,
*The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand.L.Rev. 435 (1960) ..... *passim*

***Miscellaneous:***

Articles of War, 1775, Section 50 ..... 23
Articles of War, 1776, Section X, art. 1 ..... 23
Articles of War, 1776, Section XVIII, art. 5 ..... 24
Articles of War, 1916, art. 58 ..... 8
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Articles of War, 1916, art. 74 ..... 8
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Articles of War, 1916, art. 93 ..... 9
*Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the House of Committee on Armed Services*, 81st Cong., 1st Sess. 644 (1949) ..... 10
*Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 626 (1949) ..... 10



In The

# Supreme Court of the United States

October Term, 1995

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No. 94-1966

DWIGHT J. LOVING, *Petitioner*,

*v.*

UNITED STATES OF AMERICA, *Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

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## BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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### INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division (the Division) represents Navy and Marine Corps personnel on appellate review of court-martial convictions. The Division currently represents four appellants who have been sentenced to death, more than any other branch of the Armed Services. The issues presented in the *Loving* case are of particular interest to the Division because these issues will directly impact appellate review of the four death sentences currently adjudged in the Navy and Marine Corps. Moreover, if recent history is any guide, the Navy and Marine Corps can expect at least one capital court-

martial annually. Thus, the Court's resolution of these issues is of utmost importance to presently death-sentenced service members and future capital accused. As required by Rule 37, the Division has sought and obtained consent of both parties prior to filing this brief.

## SUMMARY OF ARGUMENT

The Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946, as enacted by Congress in 1950, authorized the death penalty for several offenses. In 1983, the Court of Military Appeals held that the military's means of imposing the death penalty was no longer valid in light of this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976). *United States v. Matthews*, 16 M.J. 354, 380 (C.M.A. 1983). In 1984, the President promulgated Rule for Courts-Martial (R.C.M.) 1004, as part of the 1984 Manual for Courts-Martial. R.C.M. 1004 establishes procedures for capital cases, and includes, in section 1004(c), a list of aggravating factors which determine death penalty eligibility.

*Amicus* contends that the promulgation of R.C.M. 1004(c) was unconstitutional. Only Congress is authorized to legislate aggravating factors for death penalty cases. Congress has not delegated to the President, either explicitly or implicitly, the authority to promulgate aggravating factors in military capital cases. Furthermore, even if Congress did delegate to the President the authority to promulgate R.C.M. 1004(c), such delegation was contrary to the Framers' intent and violated the nondelegation doctrine because Congress provided insufficient guidance and limitations on the delegated authority. Moreover, even if Congress attempted to delegate the authority to promulgate R.C.M. 1004(c) to the President, such attempt would violate the separation of powers doctrine because it would be contrary to the



Framers' intent and would concentrate excessive power in the Executive Branch, while undermining Congress' authority to legislate aggravating factors for military capital cases.

## ARGUMENT

### I. THE PRESIDENT'S PROMULGATION OF AGGRAVATING FACTORS FOR DEATH PENALTY OFFENSES WAS PERFORMED WITHOUT A DELEGATION OF CONGRESS' LEGISLATIVE AUTHORITY.

### A. DEATH PENALTY IN THE MILITARY.

Following this Court's decision in *Furman* and *Gregg*, the Court of Military Appeals held that the military's means of imposing the death penalty was no longer valid where there was no "specific findings as to individualized aggravating circumstances." *Matthews*, 16 M.J. at 380. The court further opined that this flaw in the military justice system could be remedied by either the President or Congress promulgating aggravating factors. *Id.* at 380-81. It was the President who established the aggravating factors that must be found in capital courts-martial. R.C.M. 1004(c).

In promulgating R.C.M. 1004, the President elevated certain offenses under the UCMJ to capital status in an attempt to bring the military's death penalty scheme in line with this Court's decision in *Furman* and *Gregg*. *See* UCMJ art. 85, 10 U.S.C. § 885 (authorizing death for desertion in time of war); UCMJ art. 94, 10 U.S.C. § 894 (authorizing death for mutiny and sedition); UCMJ art. 99, 10 U.S.C. § 899 (authorizing death for certain actions of misbehavior before the enemy); UCMJ art. 100, 10 U.S.C. § 900 (authorizing death for a subordinate who compels a

surrender); UCMJ art. 101, 10 U.S.C. § 901 (authorizing death for the improper use of a countersign during a time of war); UCMJ art. 102, 10 U.S.C. § 902 (authorizing death where an individual violates the protection of persons, property, or places of the enemy where a "safeguard" has been posted); UCMJ art. 104, 10 U.S.C. § 904 (authorizing death for aiding the enemy); UCMJ art. 113, 10 U.S.C. § 913 (authorizing death for the misbehavior of a sentinel or lookout during a time of war); UCMJ art. 118, 10 U.S.C. § 918 (authorizing death for premeditated or felony murder); and, UCMJ art. 120, 10 U.S.C. § 920 (authorizing death for rape).

Congress has legislated only two codal provisions that, by their own force, empower a court-martial to adjudge death--UCMJ art. 106, 10 U.S.C. § 906 (mandatory death sentence for spying in time of war); and, UCMJ art. 106a, 10 U.S.C. § 906a (specifically listing aggravating factors for espionage offenses).

### B. ARTICLE 36.

*Amicus* recognizes that Congress has delegated **some** power to the President, permitting him to prescribe procedural rules as well as modes of proof. *See* UCMJ art. 36(a), 10 U.S.C. § 836(a). Congress, however, did not delegate the function at issue here, nor could it do so without violating the doctrine of separation of powers. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Even if Congress could delegate the power to prescribe aggravating factors, it did not do so under Article 36.

Article 36 authorizes the President to prescribe procedural rules and "modes of proof," not the aggravating factors which by their own force render certain military accused death-eligible. In other words, the aggravating factors delineated in R.C.M. 1004 are substantive rules because they alone determine which accused service



members may be executed for their offenses. As such, they should have been the product of legislative rather than executive action. *See Whalen v. United States,* 445 U.S. 684, 689 (1980) ("the legislative power, including the power to . . . prescribe punishments to be imposed . . . resides wholly in Congress."); *cf. Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) ("[T]he discretion to delimit the categories of crimes justifying detention, like the discretion to define criminal offenses and prescribe punishments, resides wholly with the state legislatures.").

Notably, Article 36 directs the President to prescribe procedural rules in a manner consistent with "the principles of law and rules of evidence generally recognized in the trial of criminal cases in United States District Court." UCMJ art. 36(a), 10 U.S.C. § 836(a). R.C.M. 1004, however, is directly contrary to current practice in U.S. District Court where Congress alone prescribes the aggravating factors for capital offenses. *See* 18 U.S.C. § 3592 (prescribing aggravating factors applicable in federal civilian capital proceedings). Thus, Article 36 did not authorize the specific rules at issue here because they do not conform to current practice in federal district court. *See generally Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990) (discussing the scope of the President's procedural rule-making power under Article 36).

### C. IMPLIED DELEGATION/RATIFICATION.

The lower court has held that Congress implicitly delegated to the President its authority to legislate aggravating factors, and ratified the President's promulgation of R.C.M. 1004 when it enacted UCMJ art. 106a, 10 U.S.C. § 906a, specifically providing aggravating factors for espionage cases. *United States v. Curtis*, 32 M.J. 252, 263 (C.M.A. 1991). Article 106a lists three aggravating factors and then states "[a]ny other factor that may be prescribed by the President by regulations under

section 836 of this title (article 36)." UCMJ art. 106a, 10 U.S.C. § 906a. It is this language and the lack of "any legislative effort at that time to undo [the President's] action" in which the lower court found an implicit delegation and ratification. *Curtis*, 32 M.J. at 262-63.

This legal analysis is flawed. Congress does not ratify legislation through inaction. Congress affirmatively acts through "the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Immigration & Naturalization Service v. Chada*, 462 U.S. 919, 957 (1983). Congress needs to affirmatively legislate aggravating factors as it did in Article 106a, because "[s]uch decisions cannot be assumed by acquiescence or non-action." *Greene v. McElroy*, 360 U.S. 474, 507 (1959)(citing *Kent v. Dulles*, 357 U.S. 116 (1958)).

Concerning implied delegation and ratification in an area of questioned constitutionality, this Court has held that legislative action:

> [M]ust be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, [citation omitted] but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

*Greene* 360 U.S. at 507. Thus, those servicemen sentenced to death pursuant to the President's promulgation of R.C.M. 1004 have been sentenced without the



consideration, input, and approval of Congress, the only branch of government charged with enacting the law.

### D. HISTORICAL ANALYSIS.

Even assuming that Congress may implicitly rather than explicitly delegate authority, it is clear that when Congress established the UCMJ in 1950, it did not intend to delegate any authority to the President to establish aggravating factors in capital cases. Indeed, a careful review of Congressional history from the beginning of this nation and the legislative history of the UCMJ defeats any possibility of an implicit delegation to the President, as Commander in Chief, to determine which service members would be eligible for a death sentence.

From the first Articles of War in 1775, Congress completely prohibited the trial of service members in military courts for non-military capital offenses and otherwise only allowed trial by courts-martial for civil offenses which were prejudicial to good order and discipline. The first time that Congress expanded military jurisdiction and allowed the military to try service members for civilian offenses, regardless of whether they were capital or non-capital and regardless of prejudice to good order and discipline, was in 1863.

Because of the disruption caused by the Civil War many civil courts in the South were closed, so the military was authorized to try soldiers for purely civil offenses, including the capital offenses of murder and rape. *Lee v. Madigan*, 358 U.S. 228, 233 (1959). In the act of March 3, 1863, entitled "An Act for enrolling and calling out the national forces, and for other purposes," Congress provided, in pertinent part:

> That *in time of war, insurrection, or rebellion,* murder [and other specifically named offenses] . . . shall be punishable by the sentence of a general court-martial

> or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and *the punishment for such offenses shall never be less than those inflicted by the laws of the State, territory, or district in which they have been committed.*

*Coleman v. Tennessee,* 97 U.S. 509, 513 (1878) (quoting 12 Stat. 736) (emphasis added).[1] The Court interpreted this provision to mean that the military had jurisdiction to try these purely civil offenses only when "as a result of the existence of martial law or military operations, the courts of the state were not open and military power was therefore needed to enforce the state law." *Caldwell v. Parker,* 252 U.S. 376, 386 (1920). The Court held, therefore, that the statute had no application when "the civil courts were open and in the undisturbed exercise of its jurisdiction." *Id.* (quoting *Coleman,* 97 U.S. at 515).

The provisions of the 1863 statute were formally incorporated in Article 58 of the Articles of War of 1874 with only minor changes. At the same time, the provisions of the 1806 articles requiring delivery of service members to civilian authorities was harmonized by making it inapplicable in time of war or rebellion. Article 59. The "general article" was also included in the 1874 Articles as Article 62. Construing the phrase "not capital" as found in Article 62 of the 1874 Articles of War, Colonel Winthrop, who has been referred to as "the leading nineteenth century authority on American military law", Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction,* 13 Vand. L. Rev. 435, 446 (1960), and the "Blackstone of Military Law," *Reid v. Covert,* 354 U.S. 1, 19 n.38 (1957),

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[1] The petitioner in *Coleman* had been sentenced to die by a general court-martial.



declared:

> The Article, by these words, expressly excluded from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in time of peace,) all capital crimes of officers or soldiers under whatever circumstances committed--whether upon or against military persons or civilians. By *capital* crimes is to be understood crimes punished or made *punishable* with death by the common law, or by a statute of the United States applicable to the case--as, for example, murder, arson, or rape.

2 William Winthrop, *Military Law and Precedents* 1120 (1896) (footnotes omitted) (emphasis in original). Moreover, this Court implicitly recognized that in order for a non-military offense to be tried by the military, the offense had to be one that prejudiced good order and discipline. *Ex parte Mason,* 105 U.S. 696 (1882). Specifically, the Court stated that the "gravamen of the military offence" charged in *Mason* "was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a [federal] jail over which he was standing guard." *Id.* at 698.

Subsequently, in 1916, at the urging of Major General Enoch Crowder, The Judge Advocate General of the Army, Congress extended court-martial jurisdiction to specified non-military offenses, such as larceny, robbery, and assault, regardless of prejudice to good order and discipline. Articles of War, 1916, art. 93. At the same time, Congress expressly provided that murder and rape were punishable by death in a court-martial, but rejected General Crowder's argument that jurisdiction over these offenses should also be unqualified. Duke & Vogel at 452-53. Instead Congress provided that "no person shall be tired by court-martial for murder or rape committed within the geographical limits of the States of the Union and the

District of Columbia in time of peace." Articles of War, 1916, art. 92; *see also Kahn v. Anderson,* 255 U.S. 1, 9-10 (1921).

In addition to these changes, Congress also deleted the requirement in the "general article" that in order to try service members for unspecified non-capital non-military offenses the offense had to be prejudicial to good order and discipline or service-discrediting. Articles of War, 1916, art. 96.[2] Thus, with the exception of capital offenses, Congress granted the military jurisdiction over virtually any offense committed by a service member. Moreover, Congress also eroded the requirement that for non-military offenses, the military deliver service members to civil courts upon application, by eliminating the requirement in cases where the service member was being held for court-martial. Articles of War, 1916, art. 74.[3]

While the Articles of War were extensively revised in 1920, the provisions relating to jurisdiction over non-military offenses remained substantially unchanged until the enactment of the UCMJ in 1950. In the UCMJ, Congress finally extended the military's jurisdiction to try service members for murder and rape within the geographical limits of the United States for capital offenses in peacetime. UCMJ arts. 118, 120(a), 10 U.S.C. §§ 918, 920(a). Strangely enough, this significant step was taken with only a single mention of the drastic change that was being made. *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House of Comm. on Armed Services*, 81st Cong., 1st Sess. 644

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[2] In 1950, however, when numerous non-military offenses were specifically included within the jurisdiction of courts-martial, the requirement in the "general article" that unspecified offenses had to be prejudicial to good order and discipline or service-discrediting was added once again. UCMJ art. 134, 10 U.S.C. § 934.

[3] This provision was not included in the UCMJ at all.



(1949) (statement of Richard H. Wels, Chairman, Special Committee on Military Justice of the New York County Lawyer's Association).

The clear Congressional history of strictly prohibiting the peacetime trial of service members for non-military offenses committed within the geographical limits of the United States dispels any idea of an implicit delegation of authority to the President. In addition, the legislative history of the UCMJ also dispels this illusion. One of Congress' overriding concerns in 1950 was command influence,[4] which is reflected in a number of articles, including Article 37, 10 U.S.C. § 837 (unlawful command influence of the action of a court is prohibited) and Article 67, 10 U.S.C. § 867 (creation of an appellate court composed of civilian judges). Indeed, the legislative history reflects that command influence was "perhaps the most vital single point in military justice reform." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 626 (1949) (statement of Frederick P. Bryan, Chairman, Special Committee on Military Justice of the Bar Association of the City of New York). Moreover, the concern was "not so much that innocent men are convicted as that outrageously long sentences are given by the trial court." *Id.* at 840 (statement of Professor Arthur John Keeffe of Cornell Law School). Thus, one of Congress' primary concerns was that command influence would affect the punishment that a convicted service member received.

Given this overriding concern with command influence and the historical prohibition of military jurisdiction to try service members for non-military capital offenses, it is

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[4] Command influence is a term of art in the military, but generally implies a commander's improper influence based on rank and position of authority (either intentionally or unintentionally) on the decisions of court-martial members.

completely counterintuitive to infer that when Congress allowed the military to try service members for non-military capital offenses *for the very first time* that it also implicitly delegated authority to the President to determine which service members should be eligible for the newly authorized capital sentences.

## II. WHEN CONGRESS DELEGATES ITS LEGISLATIVE AUTHORITY, IT MUST DO SO WITH SUFFICIENT SPECIFICITY TO ESTABLISH THE POLICY, GUIDELINES, AND LIMITS OF THE DELEGATED AUTHORITY.

### A. THE NONDELEGATION DOCTRINE.

"All legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const. art. I, § 1. This legislative power, however, can be shared or delegated, but "[i]n determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination," and Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406, 409 (1928)).

If Congress were to delegate to the President the authority to establish aggravating factors, this delegation must meet the "intelligible principle" test before it will pass constitutional scrutiny. *Id.* This test requires that Congress delineate the general policy of the delegated authority, determine by whom and how the authority will be applied, and the boundaries that surround the authority. *Id.* at 372-



73.

Once Congress has established these principles, the delegation of legislative authority will be constitutionally sufficient and will not violate the nondelegation doctrine.

### B. *MISTRETTA V. UNITED STATES.*

In *Mistretta* this Court determined the constitutionality of the Sentencing Guidelines promulgated by the U.S. Sentencing Commission. Congress delegated its legislative authority to promulgate these guidelines to the Sentencing Commission in the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*; 28 U.S.C. §§ 991-998.

In applying the "intelligible principle" test, this Court held that the statute was "sufficiently specific and detailed to meet constitutional requirements." *Id.* at 374. Specifically, Congress had charged the commission with three goals, specified four purposes of sentencing that must be pursued, prescribed a guidelines system for use in regulating sentencing, directed the commission to consider seven factors in the formulation of offense categories, and provided detailed guidance concerning categories of offenses and offender characteristics. *Id.* at 374-76. Congress clearly left no doubt concerning the breadth and scope of the delegated authority it was placing in the Sentencing Commission. This cannot be said for Article 36.

### C. ARTICLE 36.

Article 36, provides:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be

> prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

18 U.S.C. § 836. This statute was enacted in 1950 and has not been significantly changed since then.[5] It is chronologically impossible for Congress to have intended to delegate to the President the authority to promulgate aggravating factors--to fulfill constitutional requirements of the Eighth Amendment--twenty-two years prior to this Court's decision in *Furman*. As a Congressional delegation, Article 36 does not contain sufficient specificity or detail upon which to base a proper delegation of authority. *Cf. Touby v. United States*, 500 U.S. 160 (1991). Article 36 does not "clearly delineate[ ] [a] general policy," nor does it establish "boundaries for the delegated authority." *Mistretta*, 488 U.S. at 373. If there is a general policy it would seem to only apply to "procedural" aspects of courts-martial and not to an open-ended legislative grant.

Article 36 was written in very broad terms with no limiting guidelines other than the President "shall, **so far as he considers practicable**, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 18

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[5] Article 36 received minor changes in 1979 and 1990. DOD Authorization Act of 1980, Pub. L. No. 96-107 93 Stat. 804; National Defense Authorization Act of 1991, Pub. L. No. 101-510, 104 Stat. 1485.



U.S.C. § 836 (emphasis added). The phrase "as he considers practicable" provides absolutely no boundaries within which the President is required to act or not to act. All the President need do is make a subjective determination that something is impracticable to justify a deviation from the law and rules recognized in U.S. District Court. Nor does this language place any limitations upon the President's ability to promulgate substantive rules which are better left to the legislature.

In evaluating the practice in the U.S. District Courts, only Congress has legislated constitutionally required aggravating factors. *See* 18 U.S.C. § 3592 (prescribing aggravating factors applicable in federal civilian capital proceedings). In fact, when a district court judge attempted to create aggravating factors, in an attempt to comply with this Court's decisions in *Furman* and *Gregg*, the Ninth Circuit held that the statute involved could "not be saved by judicial formulation of the missing, but essential, guidelines." *United States v. Harper*, 729 F.2d 1216, 1226 (9th Cir. 1984). The *Harper* court further concluded that the Constitution requires aggravating circumstances to be established by a legislature. *Id.* at 1225.

Article 36 offers no general policy statements, provides no limitations upon the delegated authority of the President, and provides no specified guidelines for the President to operate within. This forty-five-year-old statute does not delegate, let alone properly delegate, Congress' legislative authority to promulgate aggravating factors in capital cases. As such, the President exceeded his authority in promulgating R.C.M. 1004.

## III. THE PRESIDENT'S PROMULGATION OF RULE FOR COURTS-MARTIAL 1004(c), ESTABLISHING AGGRAVATING FACTORS IN MILITARY DEATH PENALTY CASES, WAS AN UNCONSTITUTIONAL VIOLATION OF THE SEPARATION OF POWERS DOCTRINE AND IS CONTRARY TO THE INTENT OF THE FRAMERS OF THE CONSTITUTION.

### A. R.C.M. 1004(c) CONCENTRATES TOO MUCH POWER IN THE EXECUTIVE BRANCH, WHILE UNDERMINING CONGRESS' AUTHORITY TO LEGISLATE COURT-MARTIAL DEATH PENALTY ELIGIBILITY.

The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches -- the Legislative, the Executive, and the Judicial -- placing both substantive and procedural limitations on each. *Metropolitan Washington Airports Auth. v. Citizens*, 501 U.S. 252, 272 (1991). This system of separated powers and checks and balances was regarded by the Framers as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). It is this concern for encroachment and aggrandizement that has animated this Court's separation of powers jurisprudence. *Mistretta*, 488 U.S. at 382.

The President's promulgation of aggravating factors in R.C.M. 1004(c) violates the separation of powers doctrine. It effects an unconstitutional accumulation of power in the Executive Branch. It also undermines Congress' authority to narrow, by legislation, the class of persons eligible for the military death penalty.



All legislative powers are vested in the Congress of the United States. U.S. Const. art. I, § 1. This includes the power to make rules for the government and regulation of the armed forces. *Id.* at § 8 cl. 14. The President, as Chief Executive, is authorized to execute the laws passed by Congress. U.S. Const. art II, § 1. He is also named Commander in Chief of the armed forces. *Id.* at § 2.

Narrowing the class of persons eligible for the death penalty by the promulgation of aggravating factors is a legislative function. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983) ("statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.") Prosecuting capital cases is an executive function.

By both promulgating aggravating factors and prosecuting military capital cases, the Executive Branch both makes and executes the law. Through R.C.M. 1004(c), the President determines the class of military offenders eligible for the death penalty. The convening authority, convenes the court-martial, UCMJ art. 22, 10 U.S.C. § 822, refers the charges to the court-martial, UCMJ art. 34, 10 U.S.C. § 834, and selects the members of the court-martial, UCMJ, art. 25, 10 U.S.C. § 825. The military judge, who has neither tenure nor the protection afforded by Article III of the U.S. Constitution, is designated by the service Judge Advocate General. UCMJ art. 26, 10 U.S.C. § 826; *Weiss v. United States*, 114 S.Ct. 752, 756 (1994). The President establishes the rules of evidence and procedure. *See* UCMJ art. 36, 10 U.S.C. § 836; Manual for Courts-Martial, United States, pts. II, III (1995 edition)(Rules for Courts-Martial and Military Rules of Evidence). The service appellate judges, lack tenure and Article III protection, and are appointed by the service Judge Advocates General. UCMJ art. 66, 10 U.S.C. § 866; *Weiss*, 114 S.Ct. at 756. The judges of the Court of Appeals for the Armed Forces are civilians, but lack

Article III status. UCMJ arts. 67, 141-145, 10 U.S.C. §§ 867, 941-945.

This scheme gives the Executive Branch too much power over the conduct of military capital litigation. The President determines death penalty eligibility in R.C.M. 1004(c) and his officers prosecute and review the cases. The convening authority, the members of the court-martial, and the trial and appellate judges are all Executive Branch officers. Certiorari review by this Court is the only possibility of direct review by an Article III court in a military death penalty case. UCMJ, art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259(3).

The power to determine military death penalty eligibility and the prosecution of military death penalty cases must be divided between the Executive and Legislative Branches. *Cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) ("The power to make necessary laws is in Congress; the power to execute in the President ... But neither can the President, in war more than peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President"). Under our constitution it falls to Congress to legislate rules and regulations for the government of the armed forces. U.S. Const. art I, § 8, cl. 14. Congress is therefore the branch that must promulgate aggravating factors. *Cf. Solorio v. United States*, 483 U.S. 435, 447-448 (1987)("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military ..."); *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)(The Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.").

If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. *Reid v. Covert*,



354 U.S. at 38-39. Such blending of functions in one Branch of Government violates the separation of powers doctrine. *Id.* at 39. In military capital litigation today, the President defines death penalty eligibility. He establishes the rules of procedure and evidence. Executive Branch officers prosecute, judge, and review the proceedings. This blending of functions in one Branch of Government violates the separation of powers doctrine and is therefore unconstitutional.

### B. THE FRAMERS OF THE CONSTITUTION INTENDED THAT CONGRESS DETERMINE COURT-MARTIAL DEATH PENALTY ELIGIBILITY.

The Framers of the Constitution were cognizant and fearful of military courts-martial, *even* for members of the military. As this Court recognized, "The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history." *Reid v. Covert*, 354 U.S. at 23-24; *See also Lee v. Madigan*, 358 U.S. at 232 ("The attitude of the free society toward the jurisdiction of military tribunals -- our reluctance to give them authority to try people for nonmilitary offenses -- has a long history").

The Framers of the Constitution were aware of the history of courts-martial in seventeenth century England. Parliament recognized that in time of war the Executive had the prerogative power to adopt articles of war governing the military. Duke & Vogel at 442.

During the reign of Charles I, however, the Executive began to abuse the prerogative power and ignore the desires of Parliament. He tried citizen soldiers even during peacetime for non-military offenses. He attempted to rule the country through the army. Parliament expressed its outrage over the treatment of English citizens in the 1627

"Petition of Right" by declaring that Charles I had tried soldiers and sailors by court-martial in peacetime for "murder, robbery, felony mutiny or other outrage or misdemeanor," contrary to the common law. Duke & Vogel at 443 (quoting Petition of Right, 1627, 3 Car. 1, c. 1).

After Charles I, other Executives relied on the prerogative power and issued articles of war for the government of the military. These rulers, however, prohibited capital punishment by the military during peacetime. For example, in 1662, Charles II expressly withheld jurisdiction in capital cases. Duke & Vogel, at 443 n. 40. Likewise, in 1686, James II, although allowing court-martial jurisdiction for some civil offenses, "prohibited the infliction in time of peace, of any punishment amounting to loss of life or limb." Duke & Vogel, at 443 (citing Articles of War of James II, art. LXIV).

When William and Mary came to power in 1689, Parliament presented to them the Declaration of Rights, which was adopted as the Bill of Rights. One of the rights declared by Parliament was the right for the legislature and not the executive to control the military. "Thus, at one stroke the royal power to raise peace-time armies was severed and control over the army passed into the hands of Parliament." Duke & Vogel, at 444; *see also Reid*, 354 U.S. at 24-26.

Because of the Executive's abuse of the prerogative power, a number of influential legal scholars of the time, including Sir William Blackstone, argued that the military should not be allowed to try soldiers in peacetime. *Id.* at 26-27. For instance, Sir William Blackstone stated:

> martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The



> necessity of order and discipline in any army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the law of the land.

*Id.* (quoting 1 Blackstone's Commentaries 413).

Parliament did, however, allow the military to exercise a limited peacetime jurisdiction shortly after gaining control of the military. In the first Mutiny Act, Parliament allowed courts-martial in peacetime only for mutiny, sedition, and desertion, which were punishable by death. *Solorio*, 483 U.S. at 442 (citing Mutiny Act of 1689, 1 Wm. & Mary, ch. 5).

In addition to the Executive's abuses of military authority known to the Founders to have occurred in England, this country's own early history was marred by military excesses. As Samuel Adams wrote in 1768:

> [I]s it not enough for us to have seen soldiers and mariners forejudged of life, and executed within the body of the county by martial law? Are citizens to be called upon, threatened, ill-used at the will of the soldiery, and put under arrest, by pretext of the law military, in breach of the fundamental rights of subjects, and contrary to the law and franchise of the land?

*Reid*, 354 U.S. at 27-28 (quoting 1 Wells, *The Life and Public Services of Samuel Adams*, 231).

Because of this history of Executive abuses, the Framers of the Constitution placed control of the military in the hands of Congress. The Framers clearly intended that Congress, not the Commander in Chief, make all policy judgments concerning what offenses and punishments were cognizable in courts-martial. Duke & Vogel at 447-48. *See also* Grant W. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian"*

*Offenses: An Analysis of O'Callahan v. Parker*, 54 Minn. L. Rev. 1, 18 (1969). "[T]hose who adopted the Constitution embodied their profound fear and distrust of military power [under control of the executive], as well as their determinations to protect trial by jury, in the Constitution and its Amendments." *Reid*, 354 U.S. at 29 (citing Art. I, §§ 8 and 9; Art. II, § 2; Art. III; and Amendments II, III, V, and VI); *see also Solorio*, 483 U.S. at 446 (English history shows a strong desire to transfer the control of court-martial jurisdiction from the executive to the legislature, thus in our Constitution "Congress, and not the Executive, was given authority to make rules for the regulation of the Armed Forces").

Moreover, the early American Articles of War promulgated by many of the same men who were involved in the framing of the Constitution reflects an intent to drastically limit military jurisdiction with respect to non-military offenses. The American Articles of War, drawn primarily from the British Articles of War in effect at the time, "reflect the plain purpose to confine the scope of courts-martial jurisdiction to the trial and punishment of military offenses." Duke & Vogel, at 445.

In the American Articles of War of 1775, drafted by a committee of five men, including George Washington, *see* Nelson & Westbrook at 13 n.71, the Framers strictly limited military jurisdiction to military offenses which were prejudicial to good order and discipline. Desertion in combat and betraying the password to the enemy were the only capital offenses. The maximum punishment for any other offense was thirty-nine lashes. Lieutenant Keith J. Allred, Comment, *Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court-Martial Size and Voting Requirements*, 35 Nav. L. Rev. 153, 155-56 (1986). Shortly after the adoption of these Articles, however, George Washington's Judge Advocate General, Colonel William Tudor, petitioned Congress to adopt a stricter code, because they were unable to punish even treason with



more than 39 lashes. *Id.* at 156. In 1776, the Articles were revised "with a single end in view, military discipline." *Id.* at 157. In the revised 1776 Articles of War, reported to Congress by John Adams and Thomas Jefferson, Nelson & Westbrook at 13 n.71, a number of strictly military offenses were made punishable and the number of purely military capital offenses was increased to fourteen.[6] The maximum punishment for other offenses was increased to 100 lashes. Allred at 157-58.

With respect to non-military offenses, Section 50 of the 1775 Articles of War provided: "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and discipline, though not mentioned in the . . . articles of war, are to be taken cognizance of by a . . . court-martial . . . and punished at their discretion." No provision was made, however, to determine whether the military or civil jurisdiction had primary jurisdiction for civil offenses which also were prejudicial to good order and discipline. Allred at 160. This oversight was corrected in 1776 by granting primary jurisdiction to civil courts. Section X, Article 1 required the commanding officer to deliver over to civil magistrates any officer or solider accused of "a capital crime, or of having used violence, or . . . any offense against the persons or property of the good people of the United States, such as is punishable by the known laws of the land" upon application made by or in behalf of the injured party.

A few commentators believe that this provision of the Articles of War merely granted civilian authorities priority

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[6] The capital offenses were: mutiny, failure to suppress a mutiny, desertion, false alarms, violence to traders, cowardice, misbehavior before the enemy, casting away arms, imparting the watchword to persons not entitled to receive it, forcing a safeguard, relieving the enemy, holding correspondence with the enemy, leaving one's post or the colors in search of plunder, and forcing surrender. Allred at 158 n.40.

of prosecution and that military courts had concurrent jurisdiction. *Solorio*, 483 U.S. at 444 (citing Nelson & Westbrook, at 14). The commonly accepted view, however, is that unless the civil offense was included within the "general article" as an offense "to the prejudice of good order and military discipline", then the military had no jurisdiction over non-military offenses. *See, e.g.*, Francis T. McCoy, *Equal Justice for Servicemen: The Situation Before and Since O'Callahan v. Parker*, 16 N.Y.L.F. 1, 5 (1970).

The "general article" of the Articles of War of 1776, just like Section 50 of the 1775 Articles of War, allowed court-martial jurisdiction over service members for non-military offenses only for "[a]ll crimes not capital." American Articles of War of 1776, Section XVIII, Article 5, reprinted in 2 Winthrop 1503.[7] Regardless of other disputes concerning the nature of the military jurisdiction granted by these articles, it is clear that the "general article" excluded by its very terms capital crimes, which were numerous. Thus, the military could try service members for murders that could be classified as conduct "prejudicial to good order and discipline," but the service member could not be subjected to capital punishment because jurisdiction under the "general article" extended only to non-capital offenses. Francis T. McCoy, *Due Process for Servicemen -- The Military Justice Act of 1968*, 11 Wm. & Mary L. Rev. 66, 67 (1969); *see also Grafton v. United States*, 206 U.S. 333, 348 (1907) (under the 1776 Articles of War, no crimes of service members are excepted from military jurisdiction "except those that are capital in their nature").

In 1806, in the first Articles of War adopted after the

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[7] This article remained substantially unchanged throughout the nation's history and is now found in UCMJ art. 134, 10 U.S.C. 934. *Parker v. Levy*, 417 U.S. 733, 746 (1974).



ratification of the Constitution, Congress included similar provisions with respect to military jurisdiction over non-military offenses. *Caldwell v. Parker*, 252 U.S. at 382. Thus, from the beginning of this nation, capital offenses were withheld from military jurisdiction and "at the end of the eighteenth century all felonies committed in England with the exception for petty larceny and maiming were punishable by death." Duke & Vogel, at 447 n.61. Given this history, it is doubtful that the Framers of the Constitution ever envisioned that the military would be allowed peacetime jurisdiction to try service members for non-military capital offenses.

It is clear, however, that the Framers of the Constitution intended for Congress, not the Executive, to determine what service members would be eligible for capital punishment. This intent is reflected in the requirement that Congress legislate the rules and regulations for the government of the armed forces. *Solorio*, 483 U.S. at 447-48 ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military . . ."); *Chappell v. Wallace*, 462 U.S. at 301 (The Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline"). Thus, regardless of whether the Framers envisioned military jurisdiction in non-service related capital offenses, it is clear that the Framers never intended that the President be granted the authority to determine what service members would be eligible for the death penalty for commission of non-military capital offenses.

## CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Honorable Court find unconstitutional the President's promulgation of constitutionally-required

aggravating factors for death penalty offenses in the military. Therefore, this Honorable Court should set aside Petitioner's sentence of death and remand the case to the lower court for further action.

Respectfully Submitted,

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In the

# Supreme Court of the United States

October Term, 1995

DWIGHT J. LOVING,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

## BRIEF OF PUBLIC CITIZEN, INC, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED*

Did the Court of Military Appeals err in upholding the issuance by the President of the constitutionally-necessary aggravating factors for death penalty offenses in the military where (a) the court found only an implicit delegation of that power by Congress; (b) the court was unable to point to any explicit statutory language establishing any intelligible principles to guide the President's discretion; and (c) the delegation, if sustained, would unite in the President the power to make and execute the laws, as well as to assign and remove the military judges hearing the case?

* This question is a slightly restated version of Questions 1, 2, & 3 on which the Court granted review. The principal change is that the first question in the petition has been moved to the end.

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No. 94-1966

In the

# Supreme Court of the United States

October Term, 1995

DWIGHT J. LOVING,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

## BRIEF OF PUBLIC CITIZEN, INC, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

## INTERESTS OF *THE AMICUS*

Public Citizen, Inc. is a nonprofit organization with approximately 100,000 members. Through its Litigation Group, it has been lead counsel in many of this Court's leading separation of powers cases, such as *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), *Mistretta v. United States*, 488 U.S. 361 (1989), and *Weiss v. United States*, 114 S. Ct. 752 (1994). Like its brief in support of the petition in this case, this brief is being filed, with the written consents of the parties, because of Public Citizen's longstanding commitment to principles of separation of powers, which it believes were disregarded by the Court of Military Appeals.

## STATEMENT OF THE CASE

Petitioner, an Army private, was convicted by a court-martial of having committed two murders, as well as several other crimes. Both victims were taxi drivers; one

ride that began in Killeen, Texas, and the other occurred in Killeen, but began at Fort Hood.

Articles 118(1) and 118(4) of the Uniform Code of Military Justice, 10 U.S.C. § 918(1) and § 918(4) ("UCMJ"), authorize the death penalty for premeditated and felony murders, and the court-martial imposed it. Petitioner's death sentence was upheld by the lower courts over numerous objections, including that the President lacks the authority, under both the applicable statutes and the Constitution, to prescribe the aggravating factors that are a constitutional prerequisite for the imposition of any death penalty.

To clarify the issues relating to the power of the President, it is necessary first to review certain death penalty decisions of this Court and the Court of Military Appeals ("COMA"). Because the court below refused to reconsider its prior opinion dealing with those issues, *United States v. Curtis*, 32 M.J. 252 (C.M.A.), *cert. denied*, 502 U.S. 952 (1991), we will then discuss *Curtis*, which is, for all practical purposes, the decision under review here.

A. The Death Penalty in the Armed Forces

In 1972, this Court ruled in *Furman v. Georgia*, 408 U.S. 238, that the death penalty imposed in that case was unconstitutional. Although there were nine separate opinions, it was nevertheless clear that there was agreement on the principle that the broad discretion of a judge or jury to impose death was constitutionally unacceptable and had to be narrowed. Accordingly, in the first post-*Furman* case to uphold a death penalty, *Gregg v. Georgia*, 428 U.S. 153, 192 (1976), the Court based its affirmance on the fact that the applicable statutes ensured that the sentencer would be "given guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision" (Joint Opinion of Justices Stewart, Powell, and Stevens). *See also*



Opinion of Justice White, joined by Chief Justice Burger and Justice Rehnquist, *id.* at 222. Although *Furman* was a state court case, the opinions contained numerous references to its applicability to the federal government and in particular to the UCMJ. 408 U.S. at 307, 314, 341, 400, 412, 417-18, and 431.

Since that time, this Court has generally accepted the judgments of the state legislatures that have attempted to limit the discretion of juries, but in doing so it has repeated the core holding of *Furman* — that the state must narrow the categories of cases in which the sentencing authority may impose the death penalty. As the Court stated in *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988), "[s]ince *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Finally, in 1983 COMA ruled that courts-martial could not impose death sentences because the military justice system failed to require that the sentencing authority "make specific findings as to individualized aggravating circumstances." *United States v. Matthews*, 16 M.J. 354, 380 (1983). Although not necessary to its decision, *Matthews* suggested that the gap could be filled either by Congress or the President. *Id.* at 380-81.

President Reagan did not wait for Congress, but instead issued an Executive Order in January 1984 that amended the 1969 Manual for Courts-Martial by including for the first time a capital sentencing rule that sets forth specific aggravating factors for military death penalty offenses. Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984). In August 1984, when the current Manual came into effect, Executive Order 12,460 was rescinded, and the capital sentencing scheme was incorporated in Rule for Courts-Martial 1004. Manual for Courts-Martial, 1984, Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984), quoted at Pet. App. at 354a-360a.

As authority for Rule 1004, the President cited only the Constitution and Chapter 47 of Title 10, which is the entire UCMJ that was enacted in 1950. In addition, the drafters of the Rule cited Articles 18, 36, and 56 of the UCMJ and the President's authority as Commander-in-Chief of the Armed Forces in Article II, § 2, cl. 1 of the Constitution. However, the first of these, Article 18, does not delegate to the President the power to establish aggravating factors, but merely permits a court-martial to impose "any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter," subject to "such limitations as the President may prescribe." 10 U.S.C. § 818. The second, Article 36, authorizes the President to prescribe "[p]retrial, trial, and posttrial procedures, including modes of proof" for courts-martial, "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836.

The third statutory provision, Article 56, does not grant any authority to the President, but rather forbids a court-martial from imposing punishments which "exceed such limits as the President may prescribe[.]" 10 U.S.C. § 856. It makes no mention of the death penalty, although a number of provisions of the UCMJ provide a specific and very different role for the President in capital cases. *See infra* at 16-17. Finally, Article II's Commander-in-Chief provision is unrelated to the President's role in courts-martial, let alone in prescribing the death penalty. By contrast, the Constitution gives to Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," Article I, § 8, cl. 14, pursuant to which it has enacted the UCMJ and a number of amendments to it.



B. The *Curtis* Decisions

Ronnie Curtis was convicted of murder, and the court-martial sentenced him to death, relying on Presidentially-promulgated Rule 1004 to supply the necessary aggravating factors. On appeal, he challenged the President's authority to establish death penalty aggravating factors. By a divided vote, the Navy-Marine Corps Court of Military Review, sitting en banc, rejected this argument. *United States v. Curtis*, 28 M.J. 1074 (1989) (Pet. App. at 260a). The court ruled that death penalty aggravating factors are procedural rather than substantive and thus fall within the congressional delegation to the President of power to prescribe court-martial procedures. *Id.* at 280a-282a, citing 10 U.S.C. § 836 (1982). The court also found that Congress had provided the President with sufficient guidance to limit his discretion in establishing a military death penalty system. *Id.* at 282a-284a. Judge Albertson dissented from this portion of the opinion, reasoning that, even if Congress delegated to the President the authority to establish a military death penalty system, such a delegation was unconstitutional because it was not accompanied by "specific and detailed standards" to guide the President. *Id.* at 338a.

The Court of Military Appeals bifurcated its consideration of the case, resolving systemic challenges to the imposition of the death penalty in the military before considering factual arguments unique to Curtis. Thus, in its initial opinion, the *Curtis* court rejected the argument that the President acted without authority in establishing death penalty aggravators for courts-martial. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991) (Pet. App. at 346a). Although the result is clear, the rationale by which the court reached it is difficult to discern.

To begin with, while the drafters of the Executive Order creating Rule 1004 specified three Articles in the UCMJ as sources of the authority to prescribe aggravating factors, the Court of Military Appeals barely mentioned

them, and never attempted to demonstrate how they specifically authorized the President to establish aggravating factors for the death penalty. The court relied heavily on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Pet. App. at 362a-363a), but it specifically abjured any reliance on the President's inherent authority as Commander-in-Chief. *Id.* at 367a n.9. It also discussed at some length this Court's non-delegation opinions, including in particular *Mistretta v. United States*, 488 U. S. 361 (1989), but never pointed to specific statutory language by which to judge this delegation's validity.

Instead, the court upheld Rule 1004 on the theory that Congress did not object to the Executive Order and implicitly approved it when, a year *after* the President issued Rule 1004, Congress enacted a death penalty statute for the crime of espionage, which sets forth three specific aggravating factors and explicitly authorizes the President to prescribe others for that crime only. *See* Pub. L. No. 99-145, § 534(a), 99 Stat. 634 (1985) (codified at UCMJ Art. 106a, 10 U.S.C § 906a). The court observed that "Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial" (Pet. App. at 362a), and that it was "unaware of any indication of legislative displeasure with the President's action or any legislative effort at that time to undo his action or to curtail the use of capital punishment in courts-martial." *Id.* at 364a. The court also found that the "failure of Congress to complain about the content of [Rule 1004] can be construed to be ratification" (*id.* at 366a), and the "implication" from the passage of the special death penalty provision governing espionage is "that Congress does not consider the President's prescribing 'aggravating factors' to be in diminution of its own legislative power." *Id.* at 367a. Thus, the court said, "we conclude that Congress has — at least, implicitly — delegated this task [of prescribing the aggravating factors] to the President . . . ." *Id.* at 367a n.9.



Satisfied that it had surmounted the statutory issues, the court turned to the constitutionality of the implicit delegation. To find the necessary guidance from Congress, the court again relied on Congress' authorization to the President to prescribe additional aggravating factors for espionage contained in the subsequently-enacted Article 106a. In light of Article 106a's reference to Article 36, the court concluded that "[a]pparently Congress wished the President to look to the 'principles of law' applied in federal criminal cases in determining what should be the 'aggravating factors' for capital cases tried by court-martial." Pet. App. at 368a. The court examined the source of each of the aggravating factors in Rule 1004(c) (*id.* at 368a-374a) in order to support its finding that "they reflect policy expressed by Congress in various statutes — including several punitive articles of the Uniform Code of Military Justice — and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty." *Id.* at 368a. To support its conclusion, COMA suggested that "the President acted in reliance on legislative policy expressed in the Uniform Code of Military Justice and in other federal statutes" (*id.* at 374a), even though Rule 1004 was issued precisely because none of those statutes satisfies the specificity requirement of *Furman*. The court then returned to Article 106a, which it saw as an "approval of the standards which the President theretofore had employed" for all capital offenses covered by Rule 1004. *Id.* at 375a. Because the court found that "Congress not only acquiesced in his performance of this task but also tacitly ratified the 'aggravating factors' when it enacted Article 106a of the Uniform Code," the delegation was proper. *Id.*

## SUMMARY OF ARGUMENT

At stake in this case is whether petitioner and seven other members of the armed forces who are currently on

death row were properly sentenced to death for offenses for which Congress never specified the constitutionally-necessary aggravating factors. The court below fundamentally erred when it assumed that Congress had implicitly delegated to the President the power to fill that void and to draw the lines to determine who shall live and who shall die. To exercise that authority involves profound questions that go to the heart of our values as a society, and it should never be assumed that Congress would delegate that solemn responsibility without saying so explicitly.

There are three separate reasons why the President's act had no legal effect, any one of which is sufficient to set aside the death penalty. First, each of the statutes on which the government or COMA has relied is directed at very different aspects of the court-martial process than is deciding the appropriate death penalty aggravators. That is hardly surprising since those statutes were all enacted more than 20 years before *Furman* established the need for such criteria. By contrast, Congress specifically provided for numerous Presidential roles in the court-martial process, including that he approve each execution.

The clearest indication that Congress did not intend to allow the President to supply the missing aggravating factors for death penalty cases generally is that Congress spoke directly to this subject for the crime of espionage a year after the President promulgated Rule 1004. Thus, Article 106a of the UCMJ included three specific criteria under which a person convicted of espionage was eligible for death, and it expressly delegated to the President the power to specify other circumstances warranting the death penalty, *but only for the crime of espionage*. Surely, there would have been no need for Congress to have made that express, but limited, delegation of authority to the President if Congress had already granted him the power elsewhere in the UCMJ.

Second, Rule 1004 is invalid because nothing in the UCMJ or other laws enacted by Congress provides any



intelligible standards to confine the President's power, and hence the delegation, if indeed there is one, runs afoul of the non-delegation doctrine. This case is not like others where the debate has been over whether the standards that Congress has provided are meaningful. Instead, the issue here is whether a delegation can be valid where Congress has been completely silent.

Finally, permitting the President to prescribe the aggravating factors for military death penalty cases would violate fundamental principles of separation of powers by uniting in him the authority to legislate (through Rule 1004), to execute (by selecting the prosecutors, deciding what charges to bring, and making the ultimate ruling on punishment), and to judge (through his control over the appointment, removal, and promotion of military trial and intermediate appellate judges). At the very least, the potential problems created by such an unparalleled concentration of power in one office-holder are further reasons not to construe the general provisions on which the government relies to grant the President the extraordinary power claimed here.

## ARGUMENT

## THE DEATH PENALTY IMPOSED ON PETITIONER MUST BE SET ASIDE.

### I. THE PRESIDENT LACKS THE STATUTORY AUTHORITY TO PROMULGATE AGGRAVATING FACTORS FOR CRIMES COMMITTED BY SERVICE MEMBERS OTHER THAN THE CRIME OF ESPIONAGE.

The first question is whether Congress has authorized the President to prescribe the necessary aggravating factors. Instead of analyzing the language of the three UCMJ Articles that were cited to support Rule 1004, COMA found an

"implicit" delegation springing from congressional inaction, lack of stated displeasure, and inferences drawn from other statutes dealing with related, but different matters. On the basis of this implicit delegation, the court allowed the President to embark on an open-ended, unguided process of deciding those factors which do and which do not warrant imposition of the death penalty for the various military capital offenses.

*The UCMJ Generally*. The proposition that the UCMJ speaks to this issue at all is highly doubtful since all of the provisions relied on by the government pre-date *Furman* by more than two decades. *See United States v. Woolard*, 981 F.2d 756, 758, *reh. denied*, 990 F.2d 820 (5th Cir. 1993) (rejecting claim that pre-*Furman* statute could satisfy *Furman* mandate). As Judge Fletcher observed in his concurrence in *Matthews*, the notion that Congress actually intended in 1950 to assign these powers to the President "implies that, as a result of overabundant concern for the rights of servicemembers or as a result of mere happenstance, a unique system for imposing the death penalty evolved in the military without regard for civilian practice." 16 M.J. at 385-86.

The implausibility of the government's statutory authorization claim is underscored by the fact that COMA, which is thoroughly versed in the UCMJ, was unable to identify any provision which gave the President this authority. Instead, it concluded that congressional silence in the wake of presidential action was sufficient. But as this Court has made clear, "Congressional inaction cannot amend a duly enacted statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989). Nor should congressional silence be construed as endorsement of a regulation issued in the name of a statute. As Justice Scalia forcefully reminds us:

> [O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [congressional] intent from the failure to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.



*Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., joined by Rehnquist, C. J. , dissenting). Moreover, in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 958 (1983), this Court held that Congress acts in one way only: by enacting laws that are passed by both Houses and signed by the President or enacted by two-thirds majorities over his veto. Given the enormously sensitive and politically-charged nature of all decisions relating to the death penalty, it would be a total perversion of separation of powers to uphold COMA's "implicit delegation" ruling.

As to the only three specific UCMJ Articles relied on — Articles 18, 36, and 56 — none of them contains an express delegation to do what was done here: supply the constitutionally-required aggravating factors for death penalty cases. Moreover, although the drafters of the Executive Order asserted that these three Articles provided the President authority to supply the required aggravating factors, there is no indication of the basis for that conclusion. Before examining each of these provisions, however, some history on the federal death penalty and how Congress has chosen to deal with it may help to put the question of Congress' asserted intent to delegate this awesome power to the President in perspective.

Each of the three Articles relied on was part of the UCMJ as passed in 1950, 22 years before *Furman* was decided. Of the three, only Article 18 mentions the death penalty, permitting it "when specifically authorized by this chapter." In addition, in 1974, two years after *Furman*, Congress enacted a new federal statute authorizing the death penalty for air piracy cases, 49 U.S.C. § 1473, now recodified at 18 U.S.C. § 3592, but it left the UCMJ untouched. Moreover, when Congress enacted the comprehensive Sentencing Reform Act of 1984, which led to the sentencing guidelines approved in *Mistretta*, it failed to address specifically the question of whether the Sentencing Commission, which plainly had been delegated authority to establish sentencing ranges, including the power to specify aggravating and mitigating factors generally, was empowered to specify the required factors where the substantive statute already authorized the death penalty. 488 U.S. at 378 n.11 (assuming without deciding that the Commission has such authority, but "only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments").

Thus, to find that there was a specific delegation to the President here, this Court must assume that, in 1950, Congress anticipated and satisfied the concerns of *Furman* and provided backup authority for the President to fill in the aggravating factors that the Constitution requires. But there is not a shred of evidence anywhere that Congress gave one minute's thought to endowing the President with those kinds of powers in 1950, nor that anything that it did between then and January 1984 authorized the President to issue the challenged Executive Order. Given the gravity of the death penalty, the extensive debates in Congress about whether to impose it, *see* Establishing Constitutional Procedures for the Imposition of Capital Punishment, S. Rep. No. 282, 99th Cong. 2d Sess. 2-4 (1986), and the absence of any specific language in the UCMJ authorizing the President to supply



those factors, the Court should conclude, without further discussion, that there is no statutory delegation in this case.

*Article 18.* Article 18 deals with the "jurisdiction of general courts-martial," and it allows a general court-martial to impose any punishment within the limits that the President prescribes, if it is "not forbidden by this chapter [the UCMJ], including the penalty of death when specifically authorized by this chapter." This provision reinforces our contention that Congress wanted to retain control over the use of the death penalty because it limits the death penalty to those cases "specifically authorized by" Congress, with no mention made of any role for the President. *See also infra* at 16-17, discussing other portions of the Code that confirm this analysis.

*Article 36.* The second provision relied on — Article 36 — authorizes the President to prescribe rules, but only for "pretrial, trial, and posttrial procedures, including modes of proof." On their face, those kind of rules appear to deal with the manner in which a trial is conducted, a conclusion which is supported by the fact that Article 36 is contained in Subchapter VII entitled "Trial Practices," whereas the provisions relating to sentences are in Subchapter VIII, which includes Article 56 discussed below.

Moreover, Article 36 further directs the President "so far as he considers practicable, [to] apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . ." Of course, there are no such principles of law or rules of evidence governing the use of aggravating factors in the death penalty in district courts, which further suggests that Article 36 was not intended to delegate to the President the power to determine the appropriate aggravating factors in death penalty cases. The one district judge who tried to fill a similar void, by promulgating aggravating factors needed for the death penalty, was rapidly reversed in *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984). Indeed, as the

court of appeals noted in *Harper*, *id.* at 1225-26, it was the Justice Department's position in its briefs there and elsewhere that it was Congress' responsibility, not the courts', to satisfy the requirements of *Furman*. *See also United States v. Woolard*, *supra* (rejecting government's post-*Furman* attempt to obtain death penalty in absence of congressional enactment).

The government's broad reading of Article 36 has also been rejected by COMA in *United States v. Frederick*, 3 M.J. 230, 236 (1977), where it concluded that "the adoption of the standard for mental responsibility is not within the scope of the President's rulemaking powers under Article 36 UCMJ." It held that the question of whether the accused was mentally responsible for his actions was a matter of substantive law that the President could not decide under Article 36. Surely, if an accused's mental state is too substantive to be within the purview of Article 36, then *a fortiori* the choice of which aggravating factors are appropriate before the death penalty is imposed is also beyond the scope of Article 36.

Moreover, *Frederick* was decided in 1977, more than six years before Executive Order No. 12,460 was promulgated, thus giving Congress more than ample time to correct COMA's approach to Article 36 if Congress thought it was in error. Yet Congress did not amend Article 36. Instead, when it eventually addressed the problem in 1986, it simply added new Article 50a, 10 U.S.C. § 850a, that dealt with the issue of mental responsibility directly, and left untouched COMA's conclusion as to the scope of presidential authority under Article 36.

The decision in *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976), and Congress's response to it, further underscore the limited reach of Article 36, and how irrelevant it is to the issuance of aggravating factors in death penalty cases. In *Ware*, in the course of directing dismissal of the charges against an accused, the court suggested, in



*dicta*, that Article 36, as then written, only authorized the President to issue "procedural guidelines before courts-martial," not after trial. *Id.* at 285 & n.10. Several years later Congress responded by amending Article 36 to make clear that it reached "pretrial, trial, and posttrial" procedures. Pub. L. No. 96-107, 93 Stat. 811, 96th Cong., 1st Sess. (1979); S. Rep. No. 197, 96th Cong., 1st Sess. 123 (1979), *reprinted in* 1979 U.S. Code & Cong. Admin. News 1828-30. This amendment is important because it reflects both a desire to overrule language in an opinion of COMA, but only in a very narrow way, and because, despite the fact that *Furman* had been decided seven years, and *Gregg* three years earlier, there was not a hint that Congress ever envisioned the kind of substantive role for the President that he undertook when he supplied the constitutionally necessary factors for narrowing the class of persons eligible for the death penalty. For all these reasons, Article 36 cannot sustain the power exercised by the President here.

*Article 56.* Finally, the Executive Order fares no better in reliance on Article 56. That provision simply permits a court-martial to impose punishment which "may not exceed such limits as the President may prescribe for that offense," but does not give the President the power to prescribe the necessary aggravating factors for death penalty cases. The combination of Articles 18 and 56 does permit the President to set maximum limits for punishments within the confines of those already fixed by Congress in the UCMJ. Nonetheless, the question remains, does that power to fix maximum punishments include the power to set aggravating factors for death penalty cases? Aside from the fact that there is no evidence that Congress ever considered conferring that power on the President under Article 56 or any other provision of the UCMJ, there are other provisions of the UCMJ where Congress expressed its intent that either Congress itself, or a court-martial panel, but not the President, should decide important questions relating to the imposition of the death penalty.

The principal reason why Article 56 does not give the President the power to establish aggravating factors by Executive Order is because the Code carefully delineates several roles for the President in capital cases, but those roles do not include issuing rules for aggravating factors. Prior to the passage of Article 106a, 13 UCMJ Articles allowed the death penalty in some circumstances.[1] For some crimes, death may be imposed only in time of war, and for others there are other conditions, but none of those provisions authorizes the President to prescribe when the death penalty may be imposed. Therefore, despite the general power given to the President in Article 56 to prescribe maximum punishments, there is no basis to believe that Congress intended to delegate to him the specific power to decide the relevant factors in death penalty cases, since, as this Court has often remarked, "death is qualitatively different." *E.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As we now show, this difference is reinforced by other portions of the UCMJ in which Congress decided that the President should have a specific and limited role in the imposition of the death penalty.

The President's role in death penalty cases is expressly mandated by Article 71(a), which provides that a death sentence (and only a death sentence) "may not be executed until approved by the President [who] may commute, remit, or suspend the sentence, or any part thereof, as he sees fit [except that a death sentence] may not be suspended." As

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[1]Article 85(c) (desertion); Article 90(2) (willful disobedience of a lawful order during wartime); Article 94(b) (mutiny, sedition, or failure to suppress or report a mutiny or sedition); Article 99 (misbehavior before the enemy); Article 100 (attempting to compel surrender); Article 101 (improper use of countersign); Article 102 (forcing a safeguard); Article 104 (aiding the enemy); Article 106 (spying); Article 110(a) (improper hazarding of vessel); Article 113 (misbehavior by sentinel); Article 118 (premeditated murder or certain felony murders); and Article 120(a) (rape).



described by the Senate Armed Services Committee, actions under Article 71(a) do "not involve a review of the legality of the proceedings; rather, they are conducted as a matter of clemency." S. Rep. No. 53, 98th Cong., 1st Sess. 24 (1983). Thus, in death penalty cases, Congress made the President the final reviewer of death sentences, not the promulgator of aggravating factors necessary before the death penalty may be imposed.

It is not simply that Congress did not authorize the President to make these determinations, but in fact it lodged the decisional authority elsewhere. Thus, for spying in time of war in Article 106, U.S.C. § 106, there is a mandatory death penalty, indicating that Congress did not wish anyone else to interfere with that judgment. Similarly, if a person is found guilty of murder under Article 118, either premeditated murder under subsection (1) or felony murder under subsection (4), the person "shall suffer death or imprisonment for life as a court-martial may direct," once again leaving the President out of the process and giving the court-martial members only two choices. And for all the remaining crimes for which the death penalty is available, the punishment is "death or such other punishment as a court-martial may direct."

In our view, the care which Congress has exercised in establishing the locus of decision-making for all death penalty cases makes clear that, despite the President's general power to prescribe maximum punishments, the question whether to impose the death penalty was assigned to the court-martial panel, except where Congress itself specified the penalty. Of course, after *Furman*, leaving the choice to the unguided discretion of a court-martial is unconstitutional, and so another mechanism must be found before the death penalty may again be imposed. But since Congress has consistently taken upon itself to decide the solemn question of life or death, where it has not left it to a court-martial, there is simply no basis to believe that it intended to allow the President to undertake that responsibility. Indeed, when it

explicitly gave him that power in 1985, it did so only for espionage, further supporting our claim that Congress never delegated that power to the President when it enacted the UCMJ in 1950.

*Article 106a*. The opinion in *Curtis* and the Opposition of the government in this Court argue that the enactment of Article 106a evinces Congress' willingness both to authorize the death penalty and to allow the President to set conditions for doing so. Hence, according to *Curtis*, Article 106a validates what took place nearly two years before it was passed. There are several difficulties with that proposition.

In the first place, Article 106a itself contains the kind of detailed set of aggravating factors which are constitutionally required before the death penalty can be imposed. We do not argue that the addition of those factors alone establishes that Congress did not believe that the President had the authority to prescribe them for espionage. Because the crime of espionage was added to the UCMJ by this very statute, it would have been reasonable for Congress to have wanted to spell out, at the same time, the circumstances where the death penalty was appropriate for that crime.

But more significantly, Congress included in subsection (c)(4) of Article 106a the very explicit delegation to the President to add further aggravating factors "under [Article 36]", a power that the government insists already "implicitly" existed. Surely, there is no basis for concluding that Congress would have believed it necessary to add that provision if it thought that it had already delegated that power to the President in other parts of the UCMJ. The only conclusion that can be drawn is that Congress explicitly delegated this power to the President so that he could include additional factors in espionage cases. But Congress delegated that authority *only* for the crime of espionage, thereby underscoring the absence of Presidential power for all the other crimes for which the death penalty was



statutorily authorized, but for which there were no specific aggravating factors, let alone a specific delegation like that in Article 106a.

In its Opposition (at 12), the government cited one section of the Conference Report on Article 106a which states that the "conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles." H. R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 425 (1985), *reprinted in* 1985 U.S. Code & Cong. Admin. News 579. Similarly, another portion of that Report stated that the original House provision, from which Article 106a was derived, "was not intended to affect the validity of . . . the capital sentencing procedures promulgated by the President in the Manual for Courts-Martial, 1984." *Id.* at 424. According to the government (Opp. at 11), Article 106a "clearly reflects congressional understanding that the UCMJ, including Article 36, gives the President delegated authority to promulgate aggravating factors in capital cases."

Had Congress specifically ratified the prior aggravating factors promulgated by the President, the government's claim might have some force. But Congress did not enact those aggravating factors into law, or even give the President authority to do so on a prospective basis; its conferees simply expressed their "intent." Whatever effect conferees' intent might have in other circumstances, Article 106a is so clear, and its contrast with Articles 18, 36, and 56 so marked, that all of the expressions of intent in legislative history cannot overcome the contrary language of the relevant provisions that Congress actually enacted into law. As this Court observed in *Train v. City of New York*, 420 U.S. 35, 45 (1975), "legislative intention, without more, is not legislation." Stated another way, when Congress wanted to authorize the death penalty, it did so either by providing specific aggravating factors in the substantive statute, or by

explicitly delegating the power to do so to the President. Since it has done both, but only for espionage, and since petitioner was not charged with that offense, there is no statutory authority for the President to promulgate the aggravating factors in Rule 1004.

*Other Considerations*. Other reasons also counsel against assuming that Congress delegated to the President the power to supply aggravating factors for the crime for which petitioner was sentenced to death. Of the 14 crimes for which death may be imposed under the UCMJ, all but two — murder (premeditated and felony-murder) and rape (which now must result in death for the accused to be death eligible) — are service-connected offenses. By contrast, murder and rape are crimes for which any person may be charged and tried by the jurisdiction where the offense occurred. But to be eligible for trial by a court-martial under the UCMJ, the victim need not be in the Armed Forces, nor a dependent or otherwise related to either the accused or the military. *Solario v. United States*, 483 U.S. 435 (1987). Nor must the crime be committed on military premises, or for that matter, even in the United States. And the petitioner would have been eligible for the death penalty even if the alleged murder occurred in a state that has no death penalty. There is, of course, not a hint that Congress ever considered whether servicemen and women should be treated differently from civilians in the place where the crime was committed for crimes that have nothing to do with service in the military. Thus, the unintended usurpation of local law, based solely on the three cited Articles of the UCMJ relied upon for the Executive Order, is another reason why the Court should not assume that Congress intended to delegate this awesome power to the President.

For all these reasons, there is no basis for concluding that Congress intended to give the President the power to decide those aggravating factors that are sufficiently serious to warrant the death penalty. None of the provisions relied on was intended to deal with that subject, which was an



unknown area of the law when they were enacted as part of the original UCMJ in 1950. Moreover, because of Congress' specific decisions in Article 106a, including a limited but express delegation to the President, as well as Congress' general treatment of the death penalty in a way that is inconsistent with presidential authority to decide when it will be imposed, none of the authorities relied on supports the Executive Order's promulgation of aggravating factors necessary to support the death penalty in this case.

The issue is not, as the government urged in its Opposition (19-20), whether the power exercised by the President here is "a reasonable adjunct to his authority to regulate courts-martial," nor whether "the President should have the authority to promulgate sentencing procedures, including aggravating factors for capital or noncapital cases," nor whether Congress "could have believed that the President is in a better position to determine what factors are necessary to ensure adequate military discipline." Rather, the issue is whether Congress ever gave him that authority, and on that issue all of the evidence leads to the conclusion that it did not.

## II. ANY DELEGATION HERE VIOLATES THE NON-DELEGATION DOCTRINE.

If the Court concludes that there was a statutory delegation to the President, it must then decide whether there is an "intelligible principle" in the delegation by which the President's discretion can be confined. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). What makes the delegation ruling in *Curtis* so remarkable is that the court was unable to point to a single word in any statute from which the constitutionally required "intelligible principle" could be derived.

An examination of this Court's most recent delegation cases in the criminal law area makes clear how far this case is from meeting the constitutional standards. For instance,

in *Mistretta*, *supra*, the Court spent more than four pages examining what Congress had done in the statute to provide guidance, pointing out that there were "three goals," 488 U.S. at 374, a "specific tool" for carrying out those goals, a requirement of a "system of 'sentencing ranges' applicable for each category of offense involving each category of defendant," which included maximum amounts of the ranges, and a requirement that the Commission "use current average sentences 'as a starting point.'" *Id.* at 375. Congress also required the Commission to consider "seven factors" in establishing its offense categories and "11 factors" in establishing the categories of defendants. *Id.* at 375-76. It further "enumerated various aggravating and mitigating circumstances . . . to be reflected in the guidelines" (*id.* at 377), and made a number of other specific determinations that prevented the Commission from simply going off on its own and doing what it thought best. Plainly, there is nothing remotely resembling that kind of congressional guidance or limitation on Presidential discretion in any of the statutes relied on to support this Executive Order.

Similarly, in *Touby v. United States*, 500 U.S. 160 (1991), a challenge was made to the Attorney General's temporary addition of controlled substances to the existing schedules, which was necessary in order to act quickly to ban newly-created drugs with only slightly different formulas from drugs already on those schedules. The statute allowed such additions "to avoid imminent hazard to the public safety," and the petitioner conceded that the intelligible principle requirement had been met because the statute "meaningfully constrains the Attorney General's discretion to define criminal conduct." *Id.* at 166. The Court found that Congress had placed "multiple specific restrictions on the Attorney General's discretion to define criminal conduct," *id.* at 167, and it noted that, although there was no direct judicial review of interim additions for compliance with the statute, the government had conceded that there would be such review as a defense to a criminal action in order to



"ascertain whether the will of Congress has been obeyed." *Id.* at 168-69 (citations omitted); *see also id.* at 170 (Marshall and Blackmun JJ., concurring: judicial review assures "that the exercise of [delegated] power remains within statutory bounds"). By contrast here, it would be impossible to determine whether the will of Congress has been obeyed because Congress has not said a word on the subject of aggravating factors, other than in the espionage context, which is plainly irrelevant to this case.

In upholding the delegation in *Curtis*, COMA relied on federal statutes, state statutes, and the Model Penal Code for sources of aggravating factors and for its conclusion that "the President was not set adrift in an uncharted sea." 32 M.J. at 267 (Pet. App. at 375a). The problem with this analysis is not that the President had no charts, but that he had too many. Of course, the President "can take [the] judgments" that Congress made in other statutes into account, but under the delegation doctrine, the question is whether he *must* do so, or is he free, as he was here, to adopt whatever aggravating factors he preferred.

In fact, other than for air piracy (which is not even covered by the UCMJ), there were no other federal statutes in 1984 containing aggravating factors. Moreover, even if there were some basis for concluding that Congress intended the President to rely on non-federal sources, there was nothing approaching unanimity among state statutes and the Model Penal Code on which the President could be said to have drawn in drafting Rule 1004. While we doubt that a delegation that said "pick among existing statutes and the Model Penal Code as you choose" would be sufficient, the delegation here does not even approach that level of specificity since nothing in the UCMJ or elsewhere even purports to constrain the President's choices. Indeed, the reliance on the Model Penal Code and state statutes by the *Curtis* court and the government in its Opposition (at 15-16) is particularly problematic as applied to death penalties under the UCMJ since 11 of the 13 offenses covered by Rule 1004

are entirely military and have no civilian counterparts. *See* note 1 *supra*.

In its Opposition, the United States placed particular emphasis on Article 36 and its requirement that the President "apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts" to supply the necessary guidance (Opp. at 15-16). Of course, Article 36 can supply the needed "intelligible principle" only if, in fact, it and not some other part of the UCMJ is the statutory basis for issuing Rule 1004. However, as demonstrated above, Article 36 is quite a narrow grant of authority, and even its limited guidance cannot be read into the other Articles on which *Curtis* and the government rely.[2]

Moreover, there are no "principles of law" governing the issuance of aggravating factors for death penalty cases "generally recognized" in district courts of the United States in the "trial of criminal cases" there. As both *Harper* and *Woolard*, *supra*, at 13-14, make clear, the function of establishing aggravating factors is not one for courts, but for Congress. Nor does this Court's approval in *Gregg* and other cases of a wide variety of state legislative enactments constitute the necessary "principles of law" that are required by Article 36, as the government urged in its Opposition (at 15-16). The fact that this Court may find a state statute

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[2]Assuming *arguendo* that the government is correct that the standards for delegation are relaxed where the delegee already has delegated authority "in this area" (Opp. at 14), the question remains whether Congress has delegated to the President *any* authority to prescribe aggravating factors in death penalty cases for the military. The government's argument appears to be based on the notion that, because the President has a significant role in some aspects of courts-martial, the "area" or, as the Opposition subsequently puts it in that same sentence, "the subject matter" of the President's overall authority regarding courts-martial is the same as issuing Rule 1004, which it is not.



consistent with the Eighth Amendment does not make its decision a "principle of law" governing the "trial of criminal cases" in federal district courts within the meaning of Article 36, especially in light of the "rules of evidence" phrase which immediately follows "principles of law" and which further emphasizes the limited reach of Article 36.

Another factor, prominent in *Mistretta* as well as other cases, is wholly absent here. In most delegation cases, the Court has been loath to question Congress' judgment that, because the task at issue was very complex and required constant monitoring, it was practically impossible for Congress to take on the responsibility. Justice Blackmun's opinion in *Mistretta*, particularly at pages 372 and 379, makes it clear that to insist that Congress decide all of these questions would have been unworkable and would have made sentencing guidelines a practical impossibility. Plainly, that is not the problem here, for there are only a few crimes for which death is authorized in the UCMJ, and none of the states that have chosen to reinstate the death penalty after *Furman* encountered the kind of practical problem that was so significant in *Mistretta*. Indeed, Congress has recently done this for all federal death penalty offenses except those in the UCMJ. 18 U.S.C. § 3592. Whatever force the necessity argument may have in other contexts, it is unavailing here, even assuming that Congress ever intended to delegate to the President the power to decide which aggravating factors are appropriate for which offenses. At the very least, the substantial constitutional doubt on the issue of whether the "implicit delegation" was overbroad should give the Court further pause on the statutory issue raised in Point I, on which we principally rely.

## III. THE DELEGATION ALSO VIOLATES SEPARATION OF POWERS.

There is a final constitutional difficulty which, like the preceding problem, strongly counsels against finding an

existing delegation. This problem involves uniting in the Executive Branch the power both to prosecute death penalty cases and to decide which categories of offenses shall be subject to that penalty. It is a basic principle of separation of powers that the Congress shall write the laws, the Executive shall implement the laws, and the Judiciary shall interpret the laws. *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). Here, however, it is the President alone who is both deciding what the law shall be — who shall be subject to the death penalty — and implementing the law in his role as Commander-in-Chief, with ultimate responsibility for the prosecution of all offenses and review of all death penalty sentences. *See* Article 71(a). Yet it is precisely this kind of blending of functions — with no meaningful checks on the President's discretion — that separation of powers precludes.

This concern over uniting the power of the President and the sentencing authority was recognized in *Mistretta* as one reason why Congress had placed the Sentencing Commission in the Judicial Branch, and why it would have been improper for Congress to make the Commission part of the Executive Branch. In that event, according to the Court, the Sentencing Commission "might [have] unconstitutionally united the power to prosecute and the power to sentence within one Branch." 488 U.S. at 391 n.17. Indeed, in deciding to put the Sentencing Commission in the Judicial rather than the Executive Branch, the House of Representatives expressed this very concern:

> Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

H.R. Rep. No. 98-1017, 98th Cong., 2d Sess. 95 (1984).



This concern is not of recent vintage. Thus, in *Reid v. Covert*, 354 U.S. 1, 39 (1957), in finding that the military could not constitutionally try dependents in a court-martial, the Court expressed concern about the substantive role of the President as one of the reasons for not permitting it: "Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." And in *United States v. Brown*, 381 U.S. 437, 443 (1965), a bill of attainder case, this Court observed that separation of powers was "looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will." Similarly, in *Trop v. Dulles*, 356 U.S. 86 (1958), at least one of the concerns underlying the decision — that desertion in time of war should not cause an American citizen to lose his citizenship — was the broad discretion given to the military to decide "who among convicted deserters shall continue to be Americans and who shall be stateless." *Id.* at 90; *see also id.* at 104-05 (Black and Douglas, JJ., concurring). Finally, in *United States v. Harper*, *supra*, the Ninth Circuit concluded that "specifying the circumstances under which someone may be put to death must also be a function of the elected representatives of the people. . . [and t]he conclusion that the Constitution requires legislative guidelines in death penalty cases is thus inescapable." 729 F.2d at 1225.

This problem is greatly magnified in the military. Because the President is the Commander-in-Chief, he and his subordinates not only decide the law for death penalty crimes and prosecute those cases, but also have ultimate control over the judges who try these cases and hear the appeals, since those judges are selected for their positions by the Judge Advocates General of their Armed Service, who are ultimately responsible to the President. *See Weiss v. United*

*States*, 114 S. Ct. 752 (1994). Moreover, the President is the ultimate superior of all convening authorities for all courts-martial, and it is those convening authorities who decide what charges to bring against an accused and have other significant duties in connection with a court-martial. *See* Opposition at 7 n.3 (setting forth extensive powers of convening authority). Furthermore, pursuant to Article 71(a), 10 U.S.C. § 871(a), the President alone has the power to order that a death sentence be carried out or commuted.

To allow the President to fill the aggravating factors vacuum would be to assign to the superior of the prosecutor the power to decide the circumstances under which an accused may live or die. The Framers were very concerned about uniting in one person the power to both write the laws and execute them, *The Federalist* No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961), as was Congress when it decided to place the Sentencing Commission in the Judicial and not the Executive Branch. S. Rep. No. 98-225, 98th Cong., 1st Sess. 159 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3342. Even if such a joinder did not violate separation of powers, the Court should not assume that Congress intended such a blending of functions in the President unless there is the clearest language authorizing it. Again, we do not ask the Court to decide this constitutional question unless it is absolutely necessary, but its very existence counsels against finding a valid delegation. *See generally Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *id.* at 223-25 (O'Connor, J., dissenting).

The presumption against concentration of powers is especially strong here because the Framers were so careful to divide the responsibility for military affairs between the President and Congress. Thus, Article II, § 2 makes the President the Commander-in-Chief, but the Framers gave Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces" under Article I, § 8, cl. 14. This quite specific division of power, beyond that embodied in the basic separation of powers doctrine,



suggests a special concern about uniting executive and legislative power in the military context and thereby undermines *Curtis*' reliance on the President's inherent authority as Commander-in-Chief (Pet. App. 361a-362a). To be sure, as the Opposition argues (at 16-17), there has been an historic sharing of sentencing between the legislative and executive branches, but as footnote 6 on page 17 of the Opposition makes clear, the executive's role has been carried out by a court-martial panel in capital cases, and not by the President. *See also supra* at 16-17 (describing separate roles for President and court-martial in death cases). And it is clear after *Furman* that the wide-ranging discretion of courts-martial to impose or withhold the death penalty cannot be sustained under the Eighth Amendment.

In light of the heightened scrutiny which the Eighth Amendment compels where the death penalty is involved, even the most explicit delegation, coupled with carefully drawn standards, would raise serious constitutional issues. Such issues can be avoided by construing Articles 18, 36, and 56 narrowly, thus denying the President the life and death power to promulgate the aggravating factors needed to reactivate the death penalty in the military. Identifying those factors which may place a defendant's life in the balance is precisely the kind of decision that has traditionally been made by legislative bodies who are most responsive to the will of the people, and not by a single executive, with no checks and balances on the process by which he decides those questions.

## CONCLUSION

For the foregoing reasons, the sentence of death imposed against petitioner should be set aside.

Respectfully submitted,

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